

23707

BEFORE THE
SURFACE TRANSPORTATION BOARD

ENTERED
Office of Proceedings

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Part of
Public Record

EASTERN ALABAMA RAILWAY LLC

Complainant,

v.

UTILITIES BOARD OF THE CITY OF
SYLACAUGA

Defendant.

Finance Docket No. 35583

EXPEDITED CONSIDERATION REQUESTED

REPLY TO PETITION FOR DECLARATORY ORDER

The Utilities Board of the City of Sylacauga ("Utilities Board") hereby provides its Reply to the Petition for Declaratory Order ("Petition") filed by Eastern Alabama Railway LLC ("EARY") on December 16, 2011. This Reply is provided pursuant to 49 CFR § 1104.13(a) and the decision of the Surface Transportation Board ("STB") served on January 4, 2012. In this Reply, the Utilities Board shows that it is imperative that the STB issue a written decision¹ declaring that the condemnation of an easement for routine underground water and sewer pipes across EARY property is not preempted by 49 USC § 10501 and that there is no federal jurisdiction on the basis of a federal question. The STB should declare that these routine condemnation actions, for co-existing underground sewer and water lines, are distinguishable

¹ The Utilities Board believes that the STB can address the relevant issues either by opening a declaratory order proceeding like it did in Norfolk Southern Railway Company and the Alabama Great Southern Railroad Company – Petition for Declaratory Order, STB Docket No. 35196 (served March 1, 2010) ("NS-AGSR") or it can deny the request to open the proceeding in a decision that also addresses the issues herein like the STB did in Lincoln Lumber Company – Petition for Declaratory Order – Condemnation of Railroad Right-of-Way for a Storm Sewer, STB Docket No. 34915, slip op. at 3 (served Aug. 13, 2007) ("Lincoln Lumber").

from cases wherein the condemnation action would displace the railroad from its property. Further, the STB should declare that a hollow and undocumented allegation of interference with railroad operations is not sufficient to trigger a plausible preemption claim or a federal question regarding the state condemnation action. As described below, the Utilities Board respectfully requests that the STB take expedited action and issue a decision by February 29, 2012.

I. SUMMARY OF ARGUMENT

Innumerable utility crossings of railroad right-of-way exist in the United States today. Indeed, it would be impossible for modern society to exist without such crossings; the conveniences of modern life – electricity, fresh water, indoor plumbing, etc. – require that the nation be crisscrossed with untold thousands of miles of underground pipelines and overhead wirelines. Inevitably, these pipelines and wirelines cross paths with the 140,000 miles of rail right-of-way in the United States. These dual public uses easily co-exist.² This is because underground pipelines and overhead wirelines do not materially interfere with railroad operations and, as the STB has repeatedly found, a condemnation action for such use is not preempted.

Specifically, the two pipeline easements sought by the Utilities Board (which are the subject of the Petition) are no different than the innumerable other underground pipeline crossings existing throughout the United States. These underground pipelines will not interfere with EARY operations. In fact, one of the pipelines in the underlying action already exists and has been operating under the EARY track for 41 years. The second pipeline would be constructed using a tunnel boring method that would not even require setting foot upon the

² Furthermore, under Alabama eminent domain law, the Utilities Board must affirmatively plead and prove in the condemnation case that its proposed action will not materially interfere with the railroad's prior public use. Ala. Code § 18-1A-72(b).

surface of the EARY right-of-way.³ The Utilities Board would only need to use the surface area to meet its statutory duty to paint-mark the underground pipelines. Ala. Code § 37-15-1 *et seq.*⁴ Furthermore, the Utilities Board is willing to follow reasonable safety measures, apply reasonable technical specifications, and cooperate with EARY in scheduling its construction work – just as the Utilities Board and EARY have done for the existing crossings of the EARY track. The two crossing easements at issue in this case are not materially different from the other 90 or so other existing Utilities Board crossings of EARY.

The STB can and should issue a decision on the current record finding that the state law condemnation action is not preempted by 49 USC § 10501 and that routine underground pipelines do not unreasonably interfere with rail operations (thus supporting a finding that no federal question is raised by the condemnation). No further pleadings or filings are necessary. In fact, given the precedent on this issue, further pleadings would serve only to waste the STB's time and the parties' time, as well as unnecessarily increase litigation costs. Nevertheless, the Utilities Board believes it is imperative that the STB substantively address the issues herein so that this necessary sewer project is not further delayed and in order to deter such railroad delay tactics in the future.

Expedited action by the STB is requested due to the impending start of operations at a new IKO shingle manufacturing facility in Sylacauga by April 1, 2012. This is an important economic development for the community. If the Utilities Board is unable to construct the sewer line that is the subject of the condemnation proceeding, then the Utilities Board would be forced

³ Construction of some pipelines might briefly require occupying part of the rail right-of-way, but these are typically the edges of the right-of-way – not the railroad track.

⁴ In the unlikely event that pipe repairs are needed, temporary access to the rail right-of-way might also be required.

to construct a circuitous, much longer, and extremely expensive alternate sewer line at a cost of over one-half million dollars.⁵ For a local government entity like the Utilities Board, this is a large sum of money. Further, since the Utilities Board is a non-profit entity, that cost would be passed on directly to its customers, many of whom can ill-afford the increased utility rates that would result. To allow for the necessary construction of the sewer pipe at the EARY crossing, the Utilities Board respectfully requests that the STB issue its order or decision on or before February 29, 2012.

II. IDENTITY AND INTEREST OF THE UTILITIES BOARD

The Utilities Board is a non-profit state-created local government entity in Sylacauga, Alabama. It provides electrical, natural gas, internet, water, and wastewater services to over 12,000 customers in Sylacauga and surrounding areas. Control of the Utilities Board is vested in a three-person board of directors that is appointed by the City of Sylacauga. The Utilities Board has 66 employees and is led by Mike Richard, the General Manager.⁶

The Utilities Board has the obligation to furnish its services to those who request them within the areas in which the Utilities Board provides service as long as the requesting party complies with the Utilities Board's reasonable service rules and regulations. As stated by the Supreme Court of Alabama, "[a] public utility is obligated to serve all members of the public that it holds itself out to serve, fairly and without discrimination." Miller v. Hillview Water Works Project, Inc., 139 So. 2d 337, 339 (Ala. 1962). See also City of Mobile v. Bienville Water Supply Company, 130 Ala. 379, 384 (1900) ("The acceptance by a water company of its

⁵ In contrast, the sewer line route under the EARY right-of-way would only cost approximately \$80,000.

⁶ Mr. Richard supports and verifies the factual statements made in this Reply. See attached verification page.

franchises carries with it the duty of supplying all persons along its mains, without discrimination, with the commodity which it was organized to furnish.”); Birmingham Slag Company v. Birmingham Water Works Company, 48 So. 2d 193, 196 (Ala. 1950).

In its water function, the Utilities Board supplies an average of 3.2 million gallons of potable water daily to approximately 7,550 residential, commercial, and industrial customers. To meet this demand, the Utilities Board owns and operates two wells, two water supply reservoirs, a conventional water treatment plant, water transmission and distribution mains, six water booster pumping stations, and ten water storage tanks. The largest water pipe has a diameter of 24 inches.

In its wastewater department, the Utilities Board maintains and operates two separate systems. The main system serves the central business district, the industrial park, and the surrounding residential development. The second system serves the Fairmont area, located near the north corporate limit. The Utilities Board provides sanitary sewer service to 6,112 customers with an average daily flow of 3.932 million gallons per day to its two wastewater treatment plants. The largest wastewater pipe has a diameter of 30 inches.

The Utilities Board has approximately 90 crossings of EARY right-of-way, dozens of which are underground sewer and water pipelines.⁷

III. FACTUAL BACKGROUND

This is not the first time that the Utilities Board has been forced to file a condemnation action against EARY. In 2009, the Utilities Board filed a condemnation action in the Probate Court of Talladega County, seeking to condemn two easements across the EARY right-of-way for underground water pipes. The Probate Court entered an order condemning the easements,

⁷ Some existing crossings are overhead wirelines.

and compensation was awarded to EARY.⁸ In June 2010, the Utilities Board constructed the two underground water pipes that were at issue in the 2009 condemnation case, and the two pipelines are being used today. Construction of the portion of these pipes under EARY was completed in two days, and there was no interference with rail operations during that time. Similarly, the subsequent use of these two water pipes has not materially interfered with EARY's railroad operations.

The condemnation action that is the subject of the pending referral and EARY's Petition for Declaratory Order is related to a request for new sewer service that the Utilities Board received from IKO, a roofing products company, which is constructing a new manufacturing facility in Sylacauga. IKO has requested sewer service to start on April 1, 2012. IKO stated that it would hire 75 permanent employees, a substantial number for a town of just over 12,000 residents. To serve the new IKO facility, the Utilities Board would need to construct a new sewage line. This new line would cross under the EARY rail line beneath Hill Road on the southwest side of Sylacauga.

The Utilities Board filed a crossing application following the standard EARY procedure, but EARY stated that it would not process the application due to the ongoing litigation. Consequently, the Utilities Board filed a Complaint for Condemnation in the Probate Court of Talladega County on August 23, 2011, seeking to condemn rights for construction and operation

⁸ Both the Utilities Board and EARY appealed to the Circuit Court of Talladega County, where, in accordance with Alabama law, a *de novo* hearing occurred. Ala. Code § 18-1A-283. The Utilities Board believed the width of the easement in the probate court's decision was erroneous, while EARY claimed that the compensation awarded was inadequate. Before the Circuit Court issued a decision, the Utilities Board and EARY entered into a mediation settlement of both the condemnation action and a lawsuit brought by EARY demanding that the Utilities Board pay it substantial "rental fees" in connection with its utility lines. The Utilities Board believes that EARY is currently in breach of that settlement. However, these issues are rightfully not before the STB.

of an underground sewer line under EARY at Hill Road. Utilities Board of the City of Sylacauga v. Eastern Alabama Railway, LLC, case no. 2011/197. The Utilities Board already operates a water pipe parallel to, and underneath, Hill Road at the same crossing of EARY. Due to the proximity of the existing Hill Road water pipe to the proposed sewer pipe, the Utilities Board added the water line crossing to the same condemnation action in order to formally establish its legal right to use the water pipe crossing of EARY. This water pipeline has been in existence for approximately 41 years, and its construction and use has not materially interfered with EARY rail operations during that entire time.

Upon receipt of the Utilities Board's Complaint for Condemnation, EARY filed to remove the case to the U.S. District Court for the Northern District of Alabama claiming that the condemnation action was completely preempted. Utilities Board of the City of Sylacauga v. Eastern Alabama Railway, LLC, civil action no. 1:11-cv-03192-RBP. While the Utilities Board moved for remand back to the Probate Court, EARY moved for referral to the Surface Transportation Board. On November 17, 2011, District Judge Propst granted the referral to the STB and stayed action on the Utilities Board's Motion for Remand until such time as the STB has issued a declaratory order or declined the reference. On December 16, 2011, EARY filed the Petition.

IV. GOVERNING LAW

The STB "may issue a declaratory order to terminate a controversy or remove uncertainty." 5 USC § 554(e). See also 49 USC § 721(a). In determining whether to issue a declaratory order, the STB has "broad discretion." CSX Transportation, Inc. – Petition for Declaratory Order, STB Docket No. 34662, slip op. at 5 (served March 14, 2005); Town of Babylon and Pinelawn Cemetery – Petition for Declaratory Order, STB Docket No. 35057, slip

op. at 3 (served Oct. 16, 2009). Declaratory orders have occasionally been issued regarding requests similar to EARY's in this proceeding, namely, whether state condemnation actions are preempted by 49 USC § 10501. See, e.g., NS-AGSR. The party petitioning for a declaratory order has the burden of proof. 5 USC § 556(d).

The Utilities Board is not disputing that the exercise of condemnation by a state or local government can be preempted by 49 USC § 10501 in those situations where the condemnation action would completely displace the railroad from its property. City of Lincoln – Petition for Declaratory Order, STB Docket No. 34425, slip op. at 3 (served Aug. 12, 2004) (“City of Lincoln-STB”); NS-AGSR, slip op. at 3. However, preemption is not universal. Despite EARY's allegation, made in its Notice of Removal, that the Utilities Board action is “completely preempted”, STB precedent is clear that “broad Federal preemption does not completely remove any ability of state or local authorities to take action that affects railroad property.” Maumee & Western Railroad Corporation and RMW Ventures, LLC – Petition for Declaratory Order, STB Docket No. 34354, slip op. at 2 (served March 3, 2004). See also Lincoln Lumber, slip op. at 3.

Because of the uncertainty and unreasonable delay created by EARY's Notice of Removal that resulted in the Referring Order and Petition, the STB should issue a decision declaring that these routine co-existing condemnation actions are not preempted under 49 USC § 10501. Such an order would clarify to the referring court that the condemnation action is distinguishable from cases such as City of Birmingham v. BNSF Railway Company, which was cited by Judge Propst in his Memorandum Opinion referring this case to the STB.⁹ Such a STB

⁹ In his decision granting EARY's Motion to Refer on November 17, 2011, Judge Propst stated that he was “persuaded by Judge Proctor's cited order.” Memorandum Opinion at 6 (attached in Exhibit 1 to Petition). The Judge Proctor order was issued in City of Birmingham v. BNSF Railway Company, case no. 2:08-cv-1003-RDP (N.D. Ala., Memorandum Opinion filed July 9, 2008). Upon referral of the City of Birmingham case, the STB issued the NS-AGSR decision.

decision would also help deter future railroad actions that unnecessarily delay and/or increase the cost associated with these essential utility services.

V. ARGUMENT

A. Precedent Shows That Underground Water And Sewer Pipe Crossings Of Rail Right-Of-Way Are Common And Not Preempted

Well-established precedent holds that underground water and sewer pipe crossings of rail right-of-way, like that proposed by the Utilities Board, are considered “routine” and “non-conflicting.” Maumee & Western, slip op. at 2; New Orleans & Gulf Coast Railway Company v. Barrois, 533 F.3d 321, 332-333 (5th Cir. 2008) (“Barrois”) (“Routine crossing disputes are *not* typically preempted.”) (emphasis in original); NS-AGSR, slip op. at 5 (“non-conflicting and non-exclusive easements across railroad property for at-grade road crossings, wire crossings, sewer crossings, etc. are routinely accommodated so long as they would not interfere with rail operations or pose undue safety risks”); Lincoln Lumber, slip op. at 3 (“routine, non-conflicting uses, such as non-exclusive easements for at-grade road crossings, wire crossings, sewer crossings, etc., are not preempted so long as they would not impede rail operations or pose undue safety risks”). See also City of Lincoln v. Surface Transportation Board, 414 F.3d 858, 863 (8th Cir. 2005) (“City of Lincoln-8th Cir.”).

The underlying condemnation is not a situation where the Utilities Board is seeking to “entirely take” any land from EARY¹⁰; the subterranean water and sewer pipes can easily co-exist with EARY’s ongoing rail operations, just as rail operations and underground pipes co-exist elsewhere at dozens of locations in Sylacauga and at thousands of locations across the United States. The demonstrated co-existence and non-interference is why the STB has previously found that non-conflicting and non-exclusive easements across railroad property for things such

¹⁰ NS-AGSR, slip op. at 5.

as sewer pipes, road crossings, and wirelines are not preempted and, in fact, are “routinely accommodated” so long as they do not unduly interfere with rail operations or pose safety risks. NS-AGSR, slip op. at 5.

The underground easement sought by the Utilities Board is entirely dissimilar from cases where preemption of eminent domain has been found, such as the City of Birmingham case referenced by Judge Propst in his decision referring this case to the STB. See Petition at Exhibit 1. The referenced “Judge Proctor’s cited order” involved an action by the City of Birmingham that would have completely and permanently taken 18.86 acres of Norfolk Southern railroad property, including tracks and an area that the railroad needed to build a planned embankment wall. NS-AGSR, slip op. at 1-2. In that case, Birmingham wanted the property for permanent and exclusive occupation – construction of an amphitheater, playground, park, and walking trail. Id., slip op. at 1.

EARY is flatly wrong when it states that “it is clear” that the Utilities Board’s condemnation action is “completely” preempted. Petition, Ex. 3 at 1 and 4 (Notice of Removal). To the contrary, the STB has termed underground water and sewer pipelines “routine”, “non-exclusive”, and “non-conflicting.” Given the untold numbers of such underground pipeline crossings of rail property in the United States, it should be no surprise that such easements are not preempted. All relevant precedent shows that the condemnation action is not preempted either “categorically” or “as applied”, and that the underground pipes will not unreasonably interfere with railroad operations. Maumee & Western, slip op. at 2 (rejecting as “overbroad” any “blanket rule” that eminent domain against railroad property is always impermissible).¹¹

¹¹ In fact, state law providing for surface (as opposed to underground) crossings of railroad lines is also not necessarily preempted. The 5th Circuit has found that, even when applied against railroad right-of-way, a Louisiana statute which provides passage rights to enclosed property

B. Cases Cited By EARY Are Distinguishable

EARY's Petition to the STB is as hollow as its Notice of Removal (attached as Exhibit 3 to its Petition). The Notice of Removal reveals the cases on which EARY relies to claim that preemption exists, but these cases are uniformly distinguishable from and inapplicable to the Utilities Board's condemnation action. In particular, EARY cites to four decisions wherein state condemnation law was found preempted by ICCTA, but these cases do not support EARY's position.

First, EARY relies upon City of Lincoln – STB. In this decision, the STB found that a city's attempt to condemn of 20-foot wide strip of railroad right-of-way for a pedestrian and bicycle trail was preempted. Id., slip op. at 3.¹² This decision is easily distinguishable because it involved permanent and exclusive surface occupancy by the city in close proximity to the railroad's tracks. There was evidence that the action would (1) interfere with unloading of lumber; (2) leave insufficient room for the railroad to engage in maintenance; (3) interfere with storage and staging of commodities; (4) prevent the railroad from fulfilling its plans to build a spur track; and (5) be only 7.5 feet from the main track, less than the 10 feet recommended by the Department of Transportation. Id., slip op. at 4. None of these factors exist in the Utilities Board's attempt to condemn an easement for underground pipelines. While the trail proposed by the City of Lincoln would have required condemnation of property "necessary for railroad transportation", would "unduly interfere with railroad operations", and would take "actively used

owners "is sufficiently broad and flexible to permit the Louisiana courts to take account" of the need for property access "without *unreasonably* interfering with railroad operations." Barrois, 533 F.3d at 336 (emphasis in original).

¹² The city also sought to install an underground storm sewer in the 20-foot strip, but the railroad did not oppose the storm sewer and the STB did not address the storm sewer in the 2004 decision. Id., slip op. at 1.

railroad property” (City of Lincoln-STB, slip op. at 3-4), the Utilities Board seeks only to build an underground sewer pipeline, and condemn the right for an underground water pipeline that already exists, neither of which conflict with EARY’s railroad use of its full right-of-way.

Second, EARY relies upon the court appeal of City of Lincoln-STB, wherein the 8th Circuit affirmed the STB’s determination of preemption for the condemnation related to the uses that would completely displace the railroad. City of Lincoln-8th Cir. This decision actually supports the Utilities Board’s position because the Court noted the STB’s position that it is “well-established that nonconflicting, nonexclusive easements across railroad property [like the storm sewer proposed by the City of Lincoln] are not preempted if they do not hinder rail operations or pose safety risks.” 414 F.3d at 863. The balance of the 8th Circuit’s decision is merely a determination that there was ample evidence supporting the STB’s decision that the surface trail proposed by the City of Lincoln would unreasonably interfere with railroad operations. Again, this is wholly different from the non-conflicting underground pipelines in the Utilities Board’s condemnation action.

Third, EARY relies upon a case wherein a district court found that condemnation of railroad property was preempted where a city wanted to completely remove over one mile of railroad track to allow construction of an expanded highway. Wisconsin Central Ltd. v. The City of Marshfield, 160 F.Supp.2d 1009 (W.D. Wisc. 2000). Obviously, this sort of exclusive and permanent occupation of railroad property, even to the point of removing over one mile of track, is completely different from the underground pipelines that are the subject of the Utilities Board’s condemnation action.

Finally, EARY cites to a proposed condemnation of a new 6-lane road crossing of a rail line used for train staging, and the court decision finding the condemnation preempted. Harris

County, Texas v. Union Pacific Railroad Company, civil action no. H-10-4363 (S.D. Texas, Aug. 9, 2011). The local government wanted to build a 6-lane road across a Union Pacific (“UP”) rail line, but UP used that rail line for staging trains to keep other crossings clear. The court found that the proposed 6-lane road would unreasonably interfere with UP rail operations and, therefore, was preempted by 49 USC § 10501. Again, this factual scenario has virtually no relationship to the underground pipes (one of which already exists) at the heart of the Complaint for Condemnation filed by the Utilities Board.

The other cases cited by EARY and included in the filings attached to the Petition for Declaratory Order merely discuss preemption, ICCTA, removal, or referral generally, and do not address the interplay between state condemnation law and 49 USC § 10501. In fact, EARY’s Petition has not even attempted to support its hollow allegation that the condemnation action would interfere with its railroad operations. Likewise, EARY has not provided any evidence of such interference in the underlying action. Furthermore, as shown in Section V.C.2 below, EARY’s sworn testimony in a nearly identical condemnation in 2009 proves that there is no substantiated interference with railroad operations from the type of water or sewer condemnation sought by the Utilities Board.¹³

¹³ The Petition reveals that EARY’s assertion of interference with railroad operations is based entirely upon language in the Complaint for Condemnation that the subterranean water and sewer pipes will be “on, across, under and over” the EARY right-of-way. See Exhibit 3 of Petition, at page 4 (EARY Notice of Removal, dated Sept. 2, 2011) (emphasis added by EARY). EARY’s fixation on the “on, across, under, and over” language from the Complaint for Condemnation ignores the fact that this is standard language used in condemnation cases by the Utilities Board and other entities. See, e.g., Sustainable Forests, LLC v. Alabama Power Company, 805 So.2d 681, 682 (Ala. 2001) (easement for electric transmission lines described as “on, across, under and over” the land). This language is used because it can be difficult to predict the exact access that would be needed for an easement, especially during construction or maintenance activities. However, the language is necessarily limited by the use and purpose of the condemnation action in any particular proceeding. As the Complaint for Condemnation makes clear, the “uses and purposes” for which the easements are to be condemned are “in

C. The Facts In This Case And Sworn Prior Testimony Of EARY Confirm That There Is No Interference With Railroad Operations From Underground Sewer Or Water Condemnation Actions

1. *The Utilities Board has dozens of pre-existing underground pipeline crossings that are nearly identical to the two at issue in the Petition*

The Utilities Board currently has approximately 90 crossings of the EARY right-of-way, and 40-50 of these are underground water and sewer pipes. The two crossings, one sewer and one water, covered by the subject condemnation action will not be materially different from the dozens of existing pipe crossings. They, too, will be underground. In fact, EARY has already admitted in sworn testimony that one of the two crossings at issue in this proceeding, a 8-inch diameter water pipe that has been in existence for 41 years, has not interfered with EARY rail operations. Exhibit 2 at 95-96 (depo. of Robert Greenwood).¹⁴ The new sewage crossing

connection with the construction, operation and maintenance of subterranean water and sewer pipes.” See Exhibit 1 at 2 (Complaint for Condemnation, dated Aug. 23, 2011) (emphasis added). Similarly, the Complaint shows that the Utilities Board is seeking “all the rights conferred by law and all that are necessary, useful and convenient...for such uses and purposes.” See Exhibit 1 at 2 (emphasis added). The Utilities Board’s prayer for relief in the Complaint repeats this limitation, asking the Court to condemn the easement “to the uses and purposes” of the Utilities Board. See Exhibit 1 at 3.

Despite the apocalyptic hyperbole of EARY, the Utilities Board is obviously not seeking some sort of unfettered right of occupancy or permanent surface occupancy. The easements sought in the Complaint for Condemnation would not give the Utilities Board the right to enter the EARY right-of-way at any time (although any member of the public could actually do so, because the area for the easement crossing is within the right-of-way of Hill Road – a public thoroughfare), because such unfettered access is not necessary and appropriate to the maintenance of underground water and sewer pipelines. Instead, for purposes of the easements being sought, the Utilities Board could only enter onto the right-of-way if it is necessary and appropriate for the installation and maintenance of the underground pipelines. This is a fairly limited grant. EARY’s insinuation that the Utilities Board seeks an unfettered right to do whatever it wants with the surface is a misrepresentation of the precise and limited rights the Utilities Board seeks in its Complaint for Condemnation.

¹⁴ The Director of Right-of-Way Management for RailAmerica, the EARY parent, Robert Greenwood was deposed as part of the 2009 condemnation action. Excerpts from his deposition

proposed for the Hill Road site would be an underground 8-inch sewer line enclosed by a 16-inch protective steel casing, a design not substantially different from the dozens of other water and sewage pipelines crossing the EARY right-of-way underground. Moreover, the Utilities Board constructed two subterranean water pipes in June 2010 without incident– and the process by which this new sewer line would be constructed is materially the same.

Under Alabama law, where real property is dedicated to a prior public use, condemnation for a second public use is permissible as long as the second use does not “materially interfere” with the prior public use. Ala. Code § 18-1A-72(b). Therefore, the standard applied by the Alabama court in evaluating the Utilities Board’s Complaint for Condemnation (“materially interfere”) is functionally the same as the standard applied by the STB in determining if preemption exists (“unreasonably interfere”). Therefore, it is no surprise that the STB has previously found courts competent to address the issue of whether crossings create unreasonable interference with rail operations. Maumee & Western, slip op. at 2; Lincoln Lumber Company, slip op. at 3.

2. *No unreasonable interference with rail operations will occur*

EARY’s rail operations at the Hill Road crossing generally occur on weekdays only. This rail service consists of one loaded train per day, one empty train per day, and one round-trip hi-rail vehicle journey per day. Exhibit 3 at 18-28 (depo. of Larry Nordquist).¹⁵ EARY rail operations are generally only at night, though the hi-rail inspection usually occurs during the day.

transcript are attached as Exhibit 2. The Utilities Board can provide the full transcript if the STB believes it would be useful.

¹⁵ EARY’s Assistant General Manager, Larry Nordquist, was also deposed as part of the 2009 condemnation proceeding. Excerpts from his deposition transcript are attached as Exhibit 3. Again, the Utilities Board can provide the entire transcript if the STB so desires.

The city of Sylacauga is at the center of a large marble quarry region, and most of EARY's local Sylacauga customers are related to the marble quarrying business.

The pipelines that are the subject of the condemnation action will be underground, or "subterranean" as termed in the Complaint for Condemnation. Operation of the two pipelines will not interfere with EARY operations. Indeed, one of the two pipelines has existed for 41 years with no material impact on EARY operations. The Director of Right-of-Way Management for RailAmerica, the EARY parent, recently stated under oath that an underground pipeline causes EARY no inconvenience other than preventing EARY from leasing or selling the same underground space to another utility. Exhibit 2 (Greenwood depo. at 95-96). The Assistant General Manager for EARY was also asked, under oath, to describe the interference with EARY operations caused by the Utilities Board's pipelines. The only answers that he could provide were: (1) a Utilities Board employee might suffer a snake bite or a trip-and-fall while conducting line-marking on the EARY surface right-of-way¹⁶; and (2) he might be interrupted in his job by the need to find someone to escort Utilities Board personnel while they access the right-of-way. Exhibit 3 (Nordquist depo. at 140-146). This same employee, who has worked for EARY for 17 years, admitted that he could not name any incidents where Utilities Board access to the EARY surface right-of-way has caused problems for EARY. Exhibit 3 (Nordquist depo. at 143-144). In short, EARY's assertions of unreasonable interference are not tenable in light of EARY's own experience, empirical evidence from across the country, and well-established precedent.

Similarly, the construction process for the new sewage pipeline will not unreasonably interfere with EARY operations. The construction process occurs with a tunnel boring machine,

¹⁶ Of course, if the Utilities Board were to access the surface pursuant to a non-exclusive easement obtained through condemnation, as opposed to access as an invitee of EARY, then EARY's premises liability concerns would be rendered moot. Thus, condemnation actually helps resolve EARY's concerns.

and no surface occupancy by the Utilities Board is anticipated. East Tennessee Natural Gas, LLC v. 0.31 Acres in Tazewell County, Virginia, Norfolk Southern Railway Company, Case No. 1:06-cv-00044 (W.D.Va., April 26, 2006), slip op. at 12-13 (magistrate judge describes pipeline boring method in decision recommending a finding that a natural gas pipeline will not interfere with NS rail operations). The rail line is not put out of service during tunnel boring. During construction of two water pipelines in 2010, EARY did not even monitor the construction process. Exhibit 3 (Nordquist depo. at 133-135). No problems occurred in the 2010 construction, and the process by which the new sewer line would be built is materially the same.

Any coordination or scheduling between EARY and the Utilities Board can easily fit into the current rail operations performed by EARY. This was exactly the case in 2010 when the Utilities Board constructed two underground water pipe crossings beneath the EARY. Scheduling and cooperation in 2010 between the parties facilitated an easy and simple construction process. As it has done with its prior pipeline crossings, the Utilities Board will comply with specifications of the American Railway Engineering and Maintenance-of-Way Association ("AREMA"). The Utilities Board will follow reasonable safety precautions of EARY, and cooperate with EARY to schedule its construction activities.

3. *The crossing location is currently the site of a public street known as Hill Road*

The underground water and sewer pipelines that are the subject of the condemnation action would be located beneath an existing public street crossing of EARY at Hill Road. See Exhibit 1 (map attached to Complaint for Condemnation). In fact, there is not just a public street crossing at the easement location, but also a natural gas line, a fiber optic line, and a telephone line. Id. It strains credulity for EARY to suggest that an underground sewage pipeline will

interfere with rail operations when the same location already has a surface road, a natural gas line, a fiber optic line, a telephone line, and a water pipeline.

The Utilities Board has the ability to use public street rights-of-way for its pipelines pursuant to state law and its franchise agreement with the City of Sylacauga. Ala. Code §§ 11-50-343(a)(11) and 10A-21-2.15. See also Exhibit 4. Substantial surface occupancy by cars, trucks, and pedestrians already exists at the site where EARY now claims that underground pipelines (one of which has been in use for 41 years) will unreasonably interfere with rail operations. The Utilities Board believes that construction of the sewage pipeline can be accomplished without any surface access to the EARY right-of-way. After construction, the Utilities Board will only need access to the EARY right-of-way to fulfill its statutory duty to paint-mark the locations of the pipelines. Ala. Code § 37-15-1 *et seq.*¹⁷ This paint-marking can be done while walking along the Hill Road right-of-way – no different than any pedestrian following this public street.

4. *The Public interest will be served by a STB decision*

The public interest favors a finding that no preemption exists. Water and sewer lines are basic utility infrastructure, used and relied upon by all Americans. Granting the relief sought by the Utilities Board is in keeping with the national transportation policy determined by Congress. In particular, the order sought by the Utilities Board would reflect “sound economic conditions” and the “the needs of the public” in a “fair and expeditious regulatory decision[.]” 49 USC §§ 10101(2), (4), and (5). Additionally, the Utilities Board respectfully requests the STB to act in order to foster operation of “transportation facilities and equipment without detriment to the public health and safety” and “to encourage honest and efficient management of railroads.” 49

¹⁷ In the unlikely event that pipe repairs are needed, temporary access to the rail right-of-way might also be required.

USC §§ 10101(8) and (9). It would be wasteful of scarce local government funds to require the Utilities Board to construct the longer sewer line that would be needed to avoid the Hill Road crossing of EARY. The public coffers would be drained for no reason. Voluminous precedent and empirical evidence confirms that routine sewer and water pipes do not unreasonably interfere with rail operations. Innumerable such underground pipes already exist underneath rail lines throughout the United States.

It is also more environmentally sound to have a shorter sewage line: construction of a shorter line will require fewer resources and cause less disruption to the environment. Moreover, unlike the circuitous route to avoid EARY, the direct route underneath Hill Road does not need a supplemental pumping station. See 49 USC § 10101(14) (energy conservation is part of the national transportation policy).

With its Complaint for Condemnation, the Utilities Board is attempting to meet its public duties to provide necessary utility services. The Utilities Board is a governmental entity that provides essential services such as water and sewage on a non-profit basis to individuals, schools, institutions, and businesses in its service area. The STB should recognize that the views and actions of the Utilities Board reflect the public interest. Cf. City of Lincoln-STB, slip op. at 5 (“Because the City of Lincoln is a governmental entity that represents the interests of all its citizens, its views are an important element in proceedings involving railroad property within the City’s boundaries.”). See also NS-AGSR, slip op. at 3.

The proposed sewage line underneath EARY at the Hill Road site is necessary to provide sewage service to a new manufacturing facility in Sylacauga. The new facility, the sewage service to it, and the cost to provide that service have very real implications for Sylacauga and its citizens. If the Utilities Board is unable to use the Hill Road crossing for its new sewage line, a

much longer line at a cost of over one-half million dollars will be required. The Utilities Board respectfully requests that the STB recognize the public interest represented by its non-profit status and the services it provides to the community. A STB order or decision stating that no preemption exists is necessary to fulfill the STB's statutory mandate to "meet the needs of the public." 49 USC § 10101(4).

D. Expedited Action By The STB Is Appropriate

The Utilities Board seeks expedited action by the STB due to the extreme financial hardship that will fall upon the Utilities Board, and its citizen-customers, if an operational sewage line cannot be installed underneath the Hill Road crossing of EARY by April 2012. The STB has previously granted expedited treatment to a Petition for Declaratory Order on a shorter timeframe than that sought here by the Utilities Board. See, e.g., Union Pacific Railroad Company – Petition for Declaratory Order, STB Docket No. 35021 (served May 16, 2007). The new IKO manufacturing facility requires sewage service by April 1, 2012 in order to begin operations, and the Utilities Board is attempting to diligently meet this deadline in view of the economic importance this new industry will have for the community. If the condemnation of the Hill Road crossing of EARY is not permitted to go forward on a timely basis, the Utilities Board will have to construct a circuitous 1-mile long sewage line with an electrically-powered supplemental pump station at a cost of \$550,000 to bypass the EARY rail line. This is a huge sum of money for the Utilities Board, especially in comparison to the \$80,000 cost of using the much more direct route, only 200-feet in length, under the Hill Road crossing of EARY.

The new IKO manufacturing facility is an important economic development for Sylacauga, a small town of just over 12,000 residents. Like nearly all of the United States, Sylacauga has suffered during the economic recession of the past few years, and the IKO facility

is a crucial step toward economic recovery. However, the economic boost provided by the IKO facility will be noticeably diminished if the Utilities Board is forced to expend over half a million dollars for sewage line that should only cost \$80,000. The Utilities Board is a non-profit local government entity; all of its funding comes directly from its residential, commercial, and industrial customers.

Expedited action by the STB is warranted because there is no defensible reason for the Utilities Board to be forced to expend public funds unnecessarily for a circuitous sewage line to the IKO facility. Hence, both efficiency and the public interest favor expedited action. Underground sewer and water pipes are commonplace beneath rail lines throughout the United States. Indeed, the Utilities Board already has dozens of such pipeline crossings underneath the EARY right-of-way.

In short, it is inefficient and wasteful to require a longer route. Especially in an age when many governmental entities at all levels are struggling with meeting budgets and making ends meet, it would be simply wrong for EARY to force the Utilities Board to use an expensive, circuitous routing for an ordinary underground sewer line, thousands of which cross under rail rights-of-way without incident throughout the nation.

Expedited action is also appropriate because there is no reasonably possible scenario whereby EARY could meet its burden of proof in this proceeding. 5 USC § 556(d) (proponent of petition for declaratory order has burden of proof). See also Iowa, Chicago & Eastern Railroad Corporation v. Washington County, Iowa, 384 F.3d 557, 561 (8th Cir. 2004) (burden on railroad that petitioned STB for declaratory order, claiming preemption of state regulatory action). An extended proceeding is not necessary because there are no “factual issues...[that] raise a genuine question whether the scope of federal preemption encompasses the activities”

proposed by the Utilities Board. The City of Alexandria, Virginia – Petition for Declaratory Order, STB Docket No. 35157, slip op. at 2 (served Nov. 6, 2008). Where commencing an extended proceeding “would be an imprudent and inefficient allocation of agency resources,” the STB’s determination is on solid ground. Intercity Transportation Company v. United States, 737 F.2d 103, 109 (D.C. Cir. 1984) (court affirms ICC denial of request for declaratory order proceeding). A lengthy declaratory order proceeding would serve only to waste resources, increase litigation costs, and occupy the STB’s limited time.

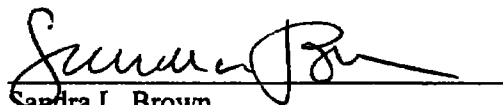
In light of the many prior statements by the STB on this issue, the STB may believe (as the Utilities Board does) that precedent clearly shows that underground pipelines do not unreasonably interfere with rail operations, and that use of eminent domain to acquire such an easement is not preempted. In such a case, the STB may believe that a declaratory order proceeding is not warranted. Nonetheless, any decision declining to institute a proceeding should provide direction to the referring Court and clearly state that no categorical preemption exists, and confirm that the state court is competent to determine whether the underground pipelines will prevent or unreasonably interfere with railroad operations. The STB took just this action in at least two recent cases. Maumee & Western, slip op. at 2 (STB provides explanation of law, then also states that “[t]hese crossing cases are typically resolved in state courts”); Lincoln Lumber Company, slip op. at 2-3 (STB explains legal doctrine, and then states the railroad’s concerns “are common and of the type that the courts are well-suited to address”). See also East Tennessee Natural Gas, Case No. 1:06-cv-00044, slip op. at 12 and 23 (W.D.Va., April 26, 2006) (magistrate judge rejects NS’s claim of preemption, and then recommends that underground natural gas pipeline should be permitted beneath NS rail line).

Regardless of whether the STB issues a declaratory order or whether it declines to institute a proceeding, the Utilities Board urges the STB to quickly provide direction to the Court on the issue of preemption to stop this current delay. Furthermore, EARY's unsupported assertions are interfering with provision of necessary water and sewage service, an event that could recur repeatedly in the future without direction from the STB.

VI. CONCLUSION

The STB should issue a decision confirming that no federal preemption exists for routine underground sewer and water pipe crossings because they can co-exist with railroad operations and do not unreasonably interfere with railroad operations. The STB should also declare that these routine underground sewer and water pipe crossings are distinguishable from the cases cited by EARY in its Notice of Removal wherein the proposed condemnation action would have displaced the railroad. Furthermore, the STB should declare that a hollow and undocumented assertion that the presence of a water or sewer pipe would "pose serious operating, safety and maintenance concerns" is false and insufficient to trigger any possibility of preemption or federal question.

Respectfully submitted,



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Thompson Hine LLP
1920 N Street, N.W., Suite 800
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(202) 263-4101
sandy.brown@thompsonhine.com

Matthew F. Carroll
Balch & Bingham LLP
P.O. Box 306
Birmingham, Alabama 35201
(205) 226-3451
mcarroll@balch.com

January 19, 2012

VERIFICATION

I, Michael Richard, verify under penalty of perjury that I have read the foregoing Reply to Petition for Declaratory Order, filed by the Utilities Board of the City of Sylacauga in STB Docket No. 35583, that I know the facts stated therein, and that the same are true and correct to the best of my knowledge, information, and belief. Further, I certify that I am qualified and authorized to file this verification.



Michael Richard
General Manager, Utilities Board of the City of Sylacauga

Executed on 1/19/2012

CERTIFICATE OF SERVICE

I hereby certify that this 19th day of January 2012, I served a copy of the foregoing upon counsel for defendant EARY as described below:

Via U.S. first class mail, postage prepaid,
and electronic mail:

Via U.S. first class mail, postage prepaid:

Louis E. Gitomer, Esq.
The Law Offices of Louis E. Gitomer
Suite 301
600 Baltimore Avenue
Towson, MD 21204

Scott G. Williams, Esq.
Senior Vice-President & General Counsel
RailAmerica, Inc.
7411 Fullerton Street, Suite 300
Jacksonville, FL 32256

Lou@lgraillaw.com

Counsel for Eastern Alabama Railway LLC



David E. Benz

EXHIBIT 1

UTILITIES BOARD OF THE CITY
OF SYLACAUGA,
a corporation,

Plaintiff,

v.

EASTERN ALABAMA RAILWAY,
LLC, ET AL.,

Defendants.

IN THE PROBATE COURT FOR
TALLADEGA COUNTY, ALABAMA

CASE NO.:

FILED
08/23/2011 04:17 PM
BILLY L. ATKINSON
PROBATE JUDGE
TALLADEGA County, ALABAMA

COMPLAINT FOR CONDEMNATION

Comes now Utilities Board of the City of Sylacauga ("Utilities Board"), a municipal corporation of the state of Alabama, and files this complaint against Eastern Alabama Railway, LLC ("EARY") and all others claiming an interest in the land described below, for an order of condemnation of the lands, rights, and interests therein, hereinafter described, and shows unto the Court as follows:

ARTICLE FIRST: That the plaintiff, Utilities Board, is a municipal corporation organized and existing under the laws of the State of Alabama, with its principal place of business in Talladega County, Alabama.

That the following party against whom this complaint is filed is a domestic limited liability company doing business in the State of Alabama:

<u>NAME</u>	<u>ADDRESS</u>	<u>INTEREST</u>
Eastern Alabama Railway, LLC	2413 Hill Road Sylacauga, AL 35151	Owner of Interest in Property

REGISTERED AGENT FOR SERVICE:

C T Corporation System
2 North Jackson Street, Suite 605
Montgomery, AL 36104

That the following person against whom this complaint is filed is over the age of nineteen (19), is of sound mind, and is a resident of the State of Alabama:

<u>NAME</u>	<u>ADDRESS</u>	<u>INTEREST</u>
Sally K. Flowers Revenue Commissioner	Talladega County Courthouse 1 Courthouse Square Talladega, AL 35161	Tax Lien

That the said defendants are the owners of, or the owners of an interest in or on, the land hereinafter described and herein set out.

ARTICLE SECOND: Plaintiff is a municipal corporation having the right by its charter to own, maintain, and operate a water and sewer system for customers in and contiguous to the City of Sylacauga, and the rights, ways and rights-of-way herein described are sought to be condemned for its water and sewer pipes, lines, and facilities for that purpose. Plaintiff has the right to condemn pursuant to section 11-50-314(11) of the 1975 Code of Alabama, as amended.

ARTICLE THIRD: That the uses and purposes for which the said land, rights and interests hereinafter described are to be condemned and taken are in connection with the construction, operation and maintenance of subterranean water and sewer pipes, lines; facilities and other appliances necessary and convenient in connection therewith, and plaintiff therefore seeks to acquire ways and rights-of-way of 20 feet in width on, across, under and over the land as hereinafter described in Parcel 1 and Parcel 2 of Article Fourth hereof, and the right to construct and erect on, across, under and over said land such subterranean water and sewer pipes, lines and facilities, and all appliances necessary, convenient and useful in connection therewith for such purposes, together with all the rights conferred by law and all that are necessary, useful and convenient to the enjoyment of said rights, ways and rights-of-way for such uses and purposes.

The property described in Parcels 1 and 2 of Article Fourth, or a portion thereof or interest therein, has previously been subjected to a public use. Plaintiff alleges that there is an actual necessity that the lands described in Parcel 1 and 2 of Article Fourth be condemned for the purposes described herein, and Plaintiff further alleges that the uses and purposes to which such lands are sought to be condemned will not materially interfere with the public use to which such lands have previously been devoted.

ARTICLE FOURTH: That the said rights, ways, rights-of-way and other interests sought to be condemned for such uses and purposes are on, across, over, under and adjacent to strips of land described hereinafter, according to the final location survey of the said ways and rights-of-way heretofore made by the plaintiff, the said strips of land and the lands of which the same are a part being situated in Talladega County, Alabama, and described as follows:

Parcel #1

A 20 foot sewer line easement being 10 feet in equal width on each side of the following described line: Commence at a concrete monument in place being the Northwest corner of Section 35, Township 21 South, Range 3 East, Talladega County, Alabama; thence proceed South 89° 12' 38" East along the North boundary of said quarter-quarter section for a distance of 752.06 feet; thence proceed South 00° 47' 22" West for a distance of 97.03 feet a point on the Northerly boundary of a railroad right-of-way, said point being the centerline of said sewer line easement and the point of beginning. From this beginning point proceed South 23° 41' 31" East along the centerline of said sewer line easement for a distance of 100.59 feet to a point on the Southerly boundary of said railroad right-of-way.

A diagram portraying Parcel #1, the property sought to be taken, and any remainder is attached to this complaint as Exhibit A.

The said **EARY** and **Sally K. Flowers**, as Revenue Commissioner, are the owners of the land described above and/or of an interest on or in said lands.

Parcel #2

A 20 foot water line easement being 10 feet in equal width on each side of the following described line: Commence at a concrete monument in place being the Northwest corner of Section 35, Township 21 South, Range 3 East, Talladega County, Alabama; thence proceed South 89° 12' 38" East along the North boundary of said quarter-quarter section for a distance of 762.46 feet; thence proceed South 00° 47' 22" West for a distance of 93.49 feet a point on the Northerly boundary of a railroad right-of-way, said point being the centerline of said water line easement and the point of beginning. From this beginning point proceed South 23° 43' 13" East along the centerline of said water line easement for a distance of 100.83 feet to a point on the Southerly boundary of said railroad right-of-way.

A diagram portraying Parcel #2, the property sought to be taken, and any remainder is attached to this complaint as Exhibit A.

The said **EARY** and **Sally K. Flowers**, as Revenue Commissioner, are the owners of the land described above and/or of an interest on or in said lands.

WHEREFORE, PREMISES CONSIDERED, plaintiff prays that this Court will make and enter an order appointing a day for the hearing of this complaint; that a copy of the complaint and notice of hearing date be served upon the defendants; and that upon such hearing, an order will be made by this Court condemning to the uses and purposes of this plaintiff, all the rights, authority and power sought and described herein, and for such other and further orders as may be authorized by law.

UTILITIES BOARD OF
THE CITY OF SYLACAUGA

By


Attorney for Plaintiff

OF COUNSEL:

W.T. CAMPBELL, JR.
Attorney at Law
400 West Third Street
Sylacauga, Alabama 35150
(256) 245-5268

BALCH & BINGHAM LLP
James A. Bradford
Matthew F. Carroll
David R. Burkholder
P. O. Box 306
Birmingham, Alabama 35201
(205) 251-8100

STATE OF ALABAMA)
JEFFERSON COUNTY)

Before me, the undersigned authority, personally appeared, MATT CARROLL, who being by me first duly sworn, deposes and says that he is one of the attorneys for the plaintiff, Utilities Board of the City of Sylacauga, and has the authority to make this affidavit and to institute and prosecute the foregoing Complaint for the condemnation of the lands, rights, and interests therein described, and that the statements contained in the foregoing complaint are true and correct as therein alleged or upon information and belief as therein alleged.

Sworn to and subscribed before me this 23rd day of August, 2011

Pracy D. Minto
Notary Public

My Commission Expires: 5-1-15

**UTILITIES BOARD OF THE CITY
OF SYLACAUGA,
a corporation,**

Plaintiff,

v.

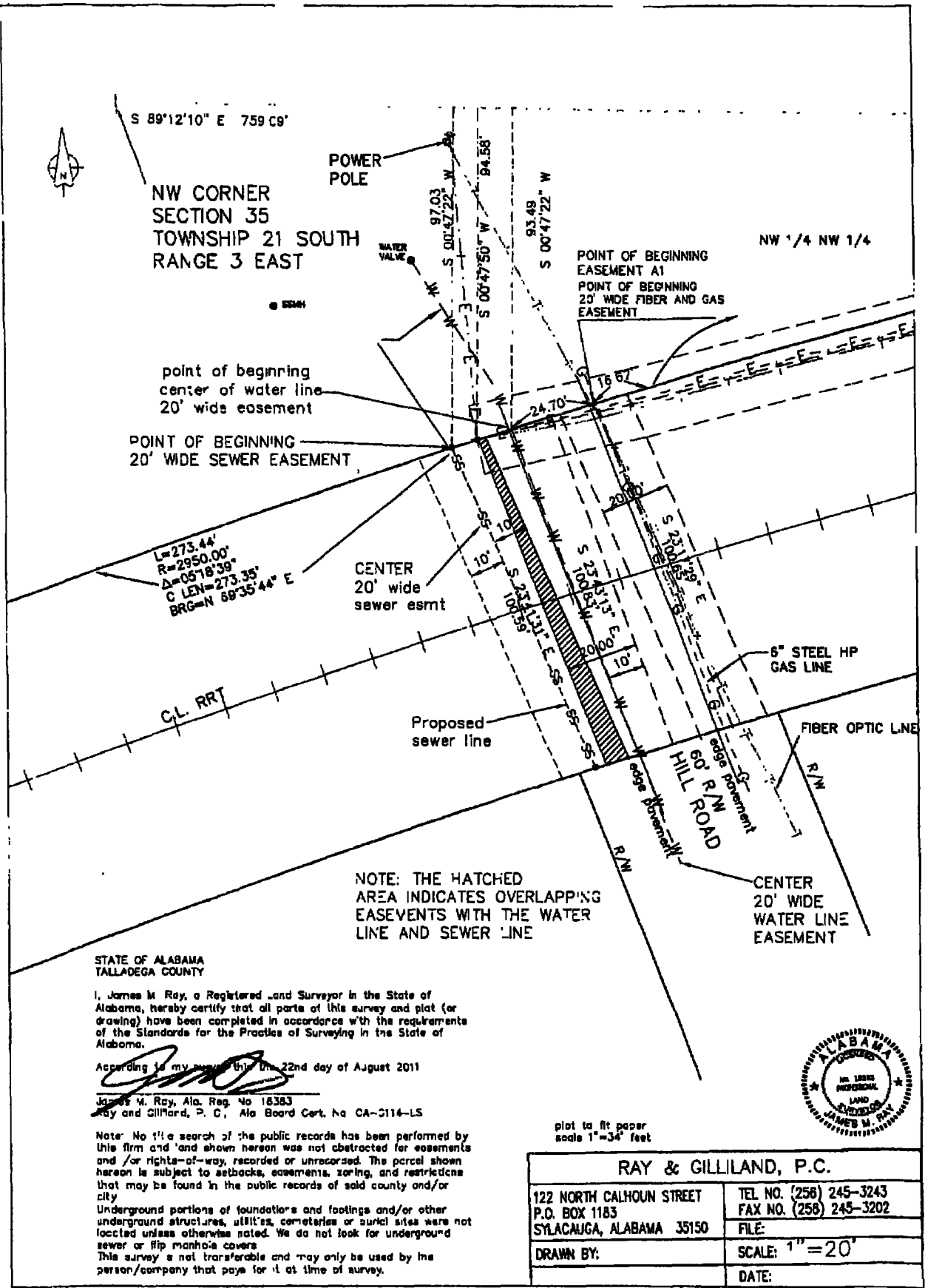
**EASTERN ALABAMA RAILWAY,
LLC, ET AL.,**

Defendants.

**IN THE PROBATE COURT FOR
TALLADEGA COUNTY, ALABAMA**

CASE NO.: _____

**EXHIBIT A TO
COMPLAINT FOR CONDEMNATION**



STATE OF ALABAMA
TALLADEGA COUNTY

I, James M. Ray, a Registered Land Surveyor in the State of Alabama, hereby certify that all parts of this survey and plat (or drawing) have been completed in accordance with the requirements of the Standards for the Practice of Surveying in the State of Alabama.

According to my survey this the 22nd day of August 2011

James M. Ray, Ala. Reg. No. 18383
Ray and Gilliland, P. C., Ala. Board Cert. No. CA-2114-LS

Note: No title search of the public records has been performed by this firm and shown hereon was not abstracted for easements and /or rights-of-way, recorded or unrecorded. The parcel shown hereon is subject to setbacks, easements, zoning, and restrictions that may be found in the public records of said county and/or city.

Underground portions of foundations and footings and/or other underground structures, utilities, cemeteries or burial sites were not located unless otherwise noted. We do not look for underground sewer or flip manhole covers.

This survey is not transferable and may only be used by the person/company that pays for it at time of survey.

plot to fit paper
scale 1"=34' feet



RAY & GILLILAND, P.C.

122 NORTH CALHOUN STREET
P.O. BOX 1183
SYLACAUGA, ALABAMA 35150

TEL. NO. (258) 245-3243
FAX NO. (258) 245-3202

FILE:

DRAWN BY:

SCALE: 1"=20'

DATE:

UTILITIES BOARD OF THE CITY
OF SYLACAUGA,
a corporation,

Plaintiff,

v.

EASTERN ALABAMA RAILWAY,
et al.,

Defendants.

) IN THE PROBATE COURT FOR
)
) TALLADEGA COUNTY, ALABAMA
)
)
)

CASE NO.: _____

NOTICE OF PENDING ACTION

TO THE HONORABLE JUDGE OF PROBATE OF TALLADEGA COUNTY, ALABAMA

You are hereby notified that on the ____ day of _____, 2011, suit was filed by Utilities Board of the City of Sylacauga, a corporation, in the Probate Court of Talladega County, Alabama styled *Utilities Board of the City of Sylacauga v. Eastern Alabama Railway, et al.*, Docket Number _____, and that the following are the names of the parties to said suit:

Name of Plaintiff:

Utilities Board of the City of Sylacauga

Name of Defendants

Eastern Alabama Railway, LLC
Sally K. Flowers, Revenue Commissioner

In said suit the following described lands situated in Talladega County, Alabama, are involved, to-wit:

Parcel #1

A 20 foot sewer line easement being 10 feet in equal width on each side of the following described line: Commence at a concrete monument in place being the Northwest corner of Section 35, Township 21 South, Range 3 East, Talladega County, Alabama; thence proceed South 89° 12' 38" East along the North boundary of said quarter-quarter section for a distance of 752.06 feet; thence proceed South 00° 47' 22" West for a distance of 97.03 feet a point on the Northerly boundary of a railroad right-of-way, said point being the centerline of said sewer line

easement and the point of beginning. From this beginning point proceed South 23° 41' 31" East along the centerline of said sewer line easement for a distance of 100.59 feet to a point on the Southerly boundary of said railroad right-of-way.

A diagram portraying Parcel #1, the property sought to be taken, and any remainder is attached to this notice as Exhibit A.

Parcel #2

A 20 foot water line easement being 10 feet in equal width on each side of the following described line: Commence at a concrete monument in place being the Northwest corner of Section 35, Township 21 South, Range 3 East, Talladega County, Alabama; thence proceed South 89° 12' 38" East along the North boundary of said quarter-quarter section for a distance of 762.46 feet; thence proceed South 00° 47' 22" West for a distance of 93.49 feet a point on the Northerly boundary of a railroad right-of-way, said point being the centerline of said water line easement and the point of beginning. From this beginning point proceed South 23° 43' 13" East along the centerline of said water line easement for a distance of 100.83 feet to a point on the Southerly boundary of said railroad right-of-way.

A diagram portraying Parcel #2, the property sought to be taken, and any remainder is attached to this notice as Exhibit A.

The said Eastern Alabama Railway, LLC., and Sally K. Flowers, as Revenue Commissioner, are the owners of the land described above or of an interest on or in said lands.

The kind of suit brought as above stated is to condemn and acquire easements, interests, ways and rights-of-way in connection with the construction, operation and maintenance of subterranean water and sewer pipes, lines; facilities and other appliances necessary and convenient in connection therewith, for the distribution, supply, and sale to the public of water and sewer services.

IN WITNESS WHEREOF, the said Utilities Board of the City of Sylacauga, a corporation, has caused this notice to be executed on this the 23rd day of August, 2011.

UTILITIES BOARD OF THE
CITY OF SYLACAUGA

By Matthew D. Smith
Attorney for Plaintiff
Utilities Board of the City of Sylacauga

OF COUNSEL:

W.T. CAMPBELL, JR.

Attorney at Law
400 West Third Street
Sylacauga, Alabama 35150
(256) 245-5268

BALCH & BINGHAM LLP

James A. Bradford
Matthew F. Carroll
P. O. Box 306
Birmingham, Alabama 35201
(205) 251-8100

UTILITIES BOARD OF THE CITY
OF SYLACAUGA,
a corporation,

Plaintiff,

v.

EASTERN ALABAMA RAILWAY,
et al.,

Defendants.

) IN THE PROBATE COURT FOR
)
) TALLADEGA COUNTY, ALABAMA
)
)
)

CASE NO.: _____

NOTICE TO DEFENDANT

TO: Sally K. Flowers, Revenue Commissioner
Talladega County Courthouse
Post Office Box 1017
Talladega, Alabama 35161-1017

You are hereby notified that Utilities Board of the City of Sylacauga, a corporation, has filed its written complaint in this Court, a copy of which is attached hereto, seeking to condemn and to acquire the lands, rights and interests therein described for ways and rights-of-way within which to construct, operate and maintain subterranean water and sewer pipes, lines, facilities and other appliances necessary and convenient in connection therewith for the delivery, supply and sale to the public of water on, across and under strips of land according to the final location survey of the said ways and rights-of-way hereto made by the plaintiff, the said strips of land and the lands of which the same are a part being situated in Talladega County, Alabama, and being set forth in said complaint.

The hearing of said complaint has been set by this Court for the ____ day of _____, 2011, at ____ o'clock ____m., and you are hereby notified to answer or object to such complaint at or prior to such hearing. Notice of said complaint and of the day so appointed for the hearing thereof is hereby given you.

Witness my hand this ____ day of _____, 2011.

Judge of the Talladega County Probate Court

UTILITIES BOARD OF THE CITY
OF SYLACAUGA,
a corporation,

Plaintiff,

v.

EASTERN ALABAMA RAILWAY,
et al.,

Defendants.

) IN THE PROBATE COURT FOR
)
) TALLADEGA COUNTY, ALABAMA
)
)

) CASE NO.: _____
)
)
)
)

NOTICE TO DEFENDANT

TO: Eastern Alabama Railway, LLC
c/o C T Corporation System
2 North Jackson Street, Suite 605
Montgomery, AL 36104

You are hereby notified that Utilities Board of the City of Sylacauga, a corporation, has filed its written complaint in this Court, a copy of which is attached hereto, seeking to condemn and to acquire the lands, rights and interests therein described for ways and rights-of-way within which to construct, operate and maintain subterranean water and sewer pipes, lines; facilities and other appliances necessary and convenient in connection therewith for the delivery, supply and sale to the public of water on, across and under strips of land according to the final location survey of the said ways and rights-of-way hereto made by the plaintiff, the said strips of land and the lands of which the same are a part being situated in Talladega County, Alabama, and being set forth in said complaint.

The hearing of said complaint has been set by this Court for the _____ day of _____, 2011, at _____ o'clock ____m., and you are hereby notified to answer or object to such complaint at or prior to such hearing. Notice of said complaint and of the day so appointed for the hearing thereof is hereby given you.

Witness my hand this _____ day of _____, 2011.

Judge of the Talladega County Probate Court

UTILITIES BOARD OF THE CITY
OF SYLACAUGA,
a corporation,

Plaintiff,

v.

EASTERN ALABAMA RAILWAY,
LLC, ET AL.,

Defendants.

CASE NO.: _____

The Utilities Board of the City of Sylacauga ("Utilities Board") requests service of defendants Eastern Alabama Railway, LLC, c/o C T Corporation System, 2 North Jackson Street, Suite 605, Montgomery, AL 36104 and Sally K. Flowers, Talladega County Revenue Commissioner, Talladega County Courthouse, 1 Courthouse Square, Talladega, Alabama 35161 by certified mail pursuant to Alabama Rule of Civil Procedure 4(i)(2).

By *Matthew A. Powell*
Attorney for Plaintiff

W.T. CAMPBELL, JR.
Attorney at Law
400 West Third Street
Sylacauga, Alabama 35150
(256) 245-5268

BALCH & BINGHAM LLP

James A. Bradford

Matthew F. Carroll

David R. Burkholder

P. O. Box 306

Birmingham, Alabama 35201

(205) 251-8100

EXHIBIT 2

In The Matter Of:
UTILITIES BOARD OF THE CITY OF SYLACAUGA
v.
EASTERN ALABAMA RAILWAY, LLC, ET AL.
CV-2010-00228

ROBERT GREENWOOD
April 27, 2011



THE HIGHEST QUALITY IN COURT REPORTING

205.252.9152 • Toll-Free 800.458.6031 • Fax 205.252.0196
One Federal Place, Suite 1020 • 1819 Fifth Avenue North • Birmingham, Alabama 35203
www.TylerEaton.com

Page 1

IN THE CIRCUIT COURT OF TALLADEGA COUNTY,
ALABAMA

CIVIL ACTION NO. CV-2010-00228

UTILITIES BOARD OF
THE CITY OF SYLACAUGA,
Plaintiff,

vs.
EASTERN ALABAMA RAILWAY, LLC,
et al.,
Defendants.

DEPOSITION
OF
ROBERT GREENWOOD
April 27, 2011

REPORTED BY: Susan B. Treadaway
Certified Shorthand Reporter
and Notary Public

Page 3

APPEARANCES

FOR THE PLAINTIFF:

Mr. Matthew F. Carroll
Attorney at Law
Balch & Bingham LLP
1901 Sixth Avenue North, Suite 1500
Birmingham, Alabama 35203
- and -

Mr. W. T. Campbell, Jr.
Attorney at Law
400 West Third Street
Sylacauga, Alabama 35150

FOR THE DEFENDANT:

Mr. John F. DeBuys, Jr.
Attorney at Law
Burr & Forman LLP
420 North 20th Street, Suite 3400
Birmingham, Alabama 35203

Page 2

STIPULATION

IT IS STIPULATED AND AGREED,

by and between the parties, through their
respective counsel, that the deposition of
ROBERT GREENWOOD may be taken before Susan
B. Treadaway, Commissioner, Certified
Shorthand Reporter and Notary Public;
That the signature to and
reading of the deposition by the witness
is waived, the deposition to have the same
force and effect as if full compliance had
been had with all laws and rules of Court
relating to the taking of depositions;

That it shall not be necessary
for any objections to be made by counsel
to any questions, except as to form or
leading questions, and that counsel for
the parties may make objections and assign
grounds at the time of trial, or at the
time said deposition is offered in
evidence, or prior thereto.

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INDEX OF EXAMINATIONS

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1 I, Susan B. Treadaway, a
2 Certified Shorthand Reporter of
3 Birmingham, Alabama, and a Notary Public
4 for the State of Alabama at Large, acting
5 as Commissioner, certify that on this
6 date, pursuant to Rule 30 of the Alabama
7 Rules of Civil Procedure and the foregoing
8 stipulation of counsel, there came before
9 me at 420 North 20th Street, Suite 3400,
10 Birmingham, Alabama, on the 27th day of
11 April, 2011, commencing at 10:20 a.m.,
12 ROBERT GREENWOOD, witness in the above
13 cause, for oral examination, whereupon the
14 following proceedings were had:

15
16 ROBERT GREENWOOD,
17 being first duly sworn, was examined and
18 testified as follows:

19
20 EXAMINATION BY MR. CARROLL:

21 Q. Please state your name for the
22 record.

23 A. My name is Robert Greenwood.

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1 was a contract case -- actually, two
2 contract cases, and some homeowners
3 association cases. Those are fun.

4 Q. Were those within the last
5 several years or do they go back further?

6 A. The furthest one back was
7 mid-'90s. Most current was about a year
8 ago.

9 Q. The one about a year ago, what
10 was that case?

11 A. That was a contract, it was a
12 homeowners association. My previous
13 employer was Beazer Homes. I was the vice
14 president of land acquisition and
15 development in northeast Florida, and the
16 case was over a cleaning contract for a
17 homeowners association, it was just an
18 asinine case.

19 Q. But in any case, all of your
20 prior depositions have been for a
21 different company, not for RailAmerica?

22 A. Correct. Correct.

23 Q. Let's -- you've done this

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1 Q. Mr. Greenwood, what's your
2 current address?

3 A. My office address is 7411
4 Fullerton Street, Suite 110, Jacksonville,
5 Florida 32256.

6 Q. You say that's your office
7 address?

8 A. That is my office address.

9 Q. And what company is based
10 there?

11 A. It is RailAmerica, one word.

12 Q. Mr. Greenwood, have you ever
13 been deposed before?

14 A. Yes, I have.

15 Q. More than once?

16 A. Yes.

17 Q. How many times?

18 A. Probably four times.

19 Q. Four times. Can you tell me,
20 I don't want to go into detail on each of
21 them, but generally in regards to what
22 those four depositions.

23 A. All real estate related. One

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1 before, but just so -- let's go over a few
2 ground rules just so we're all on the same
3 page. Since the court reporter is here to
4 record, write down everything that's said,
5 it's important that we don't talk over
6 each other. So, I will try and wait until
7 you finish your answer before I start
8 asking my next question. I'm not
9 particularly good at that, but I'm going
10 to try. If you would, wait until I finish
11 my question before you start to answer, is
12 that fine?

13 A. Okay. Correct.

14 Q. Also because she's writing
15 everything down verbally, she can't record
16 head nods, so --

17 A. Okay.

18 Q. -- answer orally.

19 A. Understood.

20 Q. Okay. If there is a question
21 I ask you that you don't understand, will
22 you let me know if you don't understand
23 it?

2 (Pages 5 to 8)

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1 A. Correct.
2 THE WITNESS: Off the record,
3 I'll tell a tiny story.
4 MR. DEBUYS: We can't get off
5 the record, you talk to me.
6 A. Okay. I have seen directional
7 bores done where the operator took a tin
8 can this big around (indicating) and put
9 it on the opposite side and says watch.
10 In an hour, the drill bit came up
11 underneath the can, so a good operator
12 can.
13 Q. Have you seen any
14 installations with the directional bore
15 where an obstruction of rock or some other
16 type of obstruction was encountered that
17 had caused the pattern to shift, the
18 drilling pattern to shift?
19 A. I have seen that, yes.
20 Q. Okay. It does happen
21 sometimes?
22 A. It does.
23 Q. And if that had happened here,

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1 then the utilities board might have had to
2 shift and even drill in a diagonal pattern
3 across or underneath the railroad --
4 A. Understand.
5 Q. -- to get its casing through,
6 correct?
7 A. Yes.
8 Q. And in that case, twenty -- it
9 might be that the utilities board would
10 end up needing a twenty-foot easement,
11 subsurface easement for construction
12 purposes simply to get a diagonal line
13 across?
14 A. It's possible.
15 Q. Okay.
16 MR. DEBUYS: Of course, it
17 wasn't connected up with the pipes down.
18 I don't know if I could go around on the
19 other side of the highway.
20 MR. CAMPBELL: That's what
21 elbows are for.
22 MR. CARROLL: I would
23 complain, but it wouldn't do any good, it

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1 wouldn't stop John from testifying.
2 MR. DEBUYS: I can see a
3 diagonal taking off down the road ending
4 up four or five hundred yards down the
5 road on the outside with no water line to
6 connect to on the other side.
7 MR. CARROLL: Let the record
8 reflect John thinks that -- John's
9 testimony is that if there was a diagonal
10 line, it would cause inconvenience to the
11 utilities board.
12 A. And a fire hydrant in the
13 middle of the track would cause an
14 inconvenience to us.
15 Q. Now, does EARY contend that
16 granting the utilities board a twenty-foot
17 easement would create more inconvenience
18 to the railroad than a three-foot
19 easement?
20 A. Yes, it does.
21 Q. How so?
22 A. Providing a twenty-foot
23 easement restricts EARY from providing

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1 occupancies for other types of utilities
2 whether it be fiber optic, whether it be
3 phone, cable, whatever, to other utility
4 providers outside of the utilities board.
5 Q. And that's a function simply
6 of space, there's --
7 A. Correct.
8 Q. When you take up twenty feet
9 of an easement, then somebody else would
10 have to move down twenty-five feet?
11 A. Correct.
12 Q. Any other reason it creates an
13 inconvenience aside from that?
14 A. As far as subsurface is
15 concerned, no.
16 Q. What about surface?
17 A. Surface, there's no need for
18 surface easement other than marking.
19 Q. Well, I understand your
20 position. My question is: In terms of
21 inconvenience, does a twenty-foot surface
22 easement create more inconvenience for the
23 railroad than three foot?

24 (Pages 93 to 96)

Page 97	Page 99
<p>1 A. Yes, it would, it would 2 preclude me from -- preclude EARY from 3 allowing any overhead uses or surface 4 uses. 5 Q. And that's true even if the 6 utilities board asked for that easement on 7 a nonexclusive basis? 8 A. I wasn't aware that the 9 easement was asked for nonexclusive. 10 Q. But if it was nonexclusive, 11 then that problem wouldn't arise? 12 A. It probably would not arise. 13 Q. Now, you know, it's possible 14 that the casing, the sleeve casing that 15 the utilities board installed could 16 rupture, I mean, that's always a 17 possibility, isn't it? 18 A. I'm not an expert on that; 19 however, it would seem as if the casing 20 were properly vented, there should not be 21 issues, but it is -- yes, I could perceive 22 that it could be possible. 23 MR. DEBUYS: You say it could?</p>	<p>1 to bore directly under. 2 Q. Okay. So, that's the answer, 3 if there -- a scenario rose where the 4 utilities board had to put in a new 5 sleeve, the railroad would say they need 6 to put it directly under the existing 7 sleeve? 8 A. It's a matter of 9 communications. If a problem arises and 10 they need to maintain, if the sleeve 11 bursts, that sleeve bursts, odds are it's 12 going to degrade the track in some form or 13 fashion or the shoulders or so on and so 14 forth, so they will need to come in and 15 get underneath there as quickly as they 16 can, shut the water off and repair the 17 blades. I would perceive that we would 18 cooperate with the utilities board and 19 allow them to come in and do such if they 20 have a true easement. 21 Q. If they have a true easement? 22 A. If they have an easement. 23 Q. But, I mean, EARY's</p>
Page 98	Page 100
<p>1 A. It is possible for a sleeve 2 to -- it could be possible for a sleeve to 3 burst or rupture. 4 Q. There's a defect. 5 A. Yes, that is possible, but 6 that's -- 7 Q. Now, if the sleeve did burst, 8 for the utilities board to continue 9 providing service to customers on the 10 other side of the railroad, they would 11 need to install a new sleeve and new 12 pipelines and seal off the existing ones, 13 correct? 14 A. Correct. 15 Q. Now, is it the railroad's 16 position that if that were to happen, the 17 utilities board would need to go ahead and 18 condemn another three-foot easement and 19 install a new line at that point? 20 A. No. 21 Q. It could go ahead and put in a 22 new -- 23 A. It would be possible for them</p>	<p>1 position -- I'm just going back to your 2 original answer. EARY's position is that 3 they could put in a new sleeve directly 4 underneath the existing sleeve? 5 A. It is reasonable to believe 6 that they can do that and that we would 7 allow for that. 8 Q. Does that need to be part of 9 the Court's order or can the utilities 10 board just come ask you for that later if 11 something happened? 12 A. I would have to think about 13 that one. 14 Q. Okay. Do you want to think 15 about it and get back to me with an answer 16 at a later date? 17 MR. DEBUYS: I don't want him 18 to speculate if he doesn't know what the 19 company policy is. If you want to know 20 his opinion, that's one thing. 21 MR. CARROLL: No, I agree. I 22 don't want him to speculate either. 23 Q. You can't answer that question</p>

25 (Pages 97 to 100)

EXHIBIT 3

In The Matter Of:
UTILITIES BOARD OF THE CITY OF SYLACAUGA
v.
EASTERN ALABAMA RAILWAY, LLC, ET AL.

CV-2010-00228

LARRY NORDQUIST
August 10, 2011



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IN THE CIRCUIT COURT OF TALLADEGA COUNTY,
ALABAMA

CIVIL ACTION NO. Cv-2010-00228

UTILITIES BOARD OF THE CITY OF SYLACAUGA,
Plaintiff,

vs.
EASTERN ALABAMA RAILWAY, LLC et al.,
Defendants.

DEPOSITION
OF
LARRY NORDQUIST
August 10, 2011

REPORTED BY: Laura H. Nichols
Certified Realtime Reporter,
Registered Professional
Reporter and Notary Public

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STIPULATION

IT IS STIPULATED AND AGREED,
by and between the parties, through their
respective counsel, that the deposition of
LARRY NORDQUIST may be taken before Laura
H. Nichols, Commissioner, Certified
Realtime Reporter, Registered Professional
Reporter and Notary Public;

That the signature to and
reading of the deposition by the witness
is waived, the deposition to have the same
force and effect as if full compliance had
been had with all laws and rules of Court
relating to the taking of depositions;

That it shall not be necessary
for any objections to be made by counsel
to any questions, except as to form or
leading questions, and that counsel for
the parties may make objections and assign
grounds at the time of trial, or at the
time said deposition is offered in
evidence, or prior thereto.

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1 (Pages 1 to 4)

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<p>1 I, Laura H. Nichols, a 2 Certified Realtime Reporter and Registered 3 Professional Reporter of Birmingham, 4 Alabama, and a Notary Public for the State 5 of Alabama at Large, acting as 6 Commissioner, certify that on this date, 7 pursuant to Rule 30 of the Alabama Rules 8 of Civil Procedure and the foregoing 9 stipulation of counsel, there came before 10 me at the offices of Burr & Forman LLP, 11 3400 Wachovia Tower, Birmingham, Alabama, 12 on August 10, 2011, commencing at 1:40 13 p.m., LARRY NORDQUIST, witness in the 14 above cause, for oral examination, 15 whereupon the following proceedings were 16 had: 17 18 LARRY NORDQUIST, 19 being first duly sworn, was examined and 20 testified as follows: 21 22 EXAMINATION BY MR. CARROLL: 23 Q. Mr. Nordquist, if you would,</p>	<p>Q. Okay. Do you remember 2 generally what the subject matter was? 3 A. Actually, no, I don't. 4 Q. Well, since it has been a 5 while since your last deposition, I will 6 just sort of briefly go over the ground 7 rules. You probably talked to Mr. DeBuys 8 about them before we started but just so 9 that we understand each other. 10 A. Okay. 11 Q. As you know, the court 12 reporter here is here to take down 13 everything that we say, so it is important 14 that we not talk over each other. 15 A. Okay. 16 Q. I am going to try and wait and 17 try to be patient and let you finish an 18 answer before I start asking another 19 question. And by the same token, I would 20 ask that you wait and not start answering 21 my question until I am done at phrasing 22 it, okay? 23 A. Okay.</p>
Page 6	Page 8
<p>1 go ahead and state your full name for the 2 record. 3 A. Larry Carl Nordquist. 4 Q. And what is your current 5 address, Mr. Nordquist? 6 A. 195 Brandy Lane, Harpersville, 7 Alabama 35078. 8 Q. I know we have met before. 9 But for the record, my name is Matt 10 Carroll. I am an attorney for the 11 Utilities Board of Sylacauga for the 12 condemnation case we previously had 13 together. 14 Have you ever been deposed 15 before? 16 A. Yes. 17 Q. How many times? 18 A. Once that I can remember. 19 Q. When was that, if you recall? 20 A. I don't know the exact date. 21 I would say over six years ago. 22 Q. Just been a while? 23 A. Yeah,</p>	<p>1 Q. If I ask you a question you 2 don't understand, let me know. I will try 3 and clear it up. 4 A. Okay. 5 Q. Are you on any medications or 6 do you have any conditions that would 7 prevent you from truthfully answering my 8 questions today? 9 A. No. 10 Q. If you need to take a short 11 break, let me know. I can't keep you here 12 as a prisoner. 13 A. Okay. 14 Q. Can you tell me where you are 15 currently employed? 16 A. I am employed with Eastern 17 Alabama Railway. 18 Q. And how long have you worked 19 there? 20 A. Seventeen years. 21 Q. What is your current title? 22 A. Current title is assistant 23 general manager.</p>

2 (Pages 5 to 8)

Page 17	Page 19
<p>1 Q. Do you remember when you saw 2 it? 3 A. No, I don't. 4 Q. Do you remember being involved 5 in helping prepare the answers for these 6 interrogatories? 7 A. Yes. 8 Q. Can you just sort of generally 9 describe your involvement? Did you 10 provide the information for some of these? 11 Did you review them? 12 A. Some of them I was asked if I 13 could answer the question. 14 Q. Do you remember which ones 15 those were? I know it has probably been a 16 while. 17 A. It has been a while. 18 Q. Take a minute and just look 19 over it real quick, see if you can refresh 20 your memory. 21 (Pause.) 22 A. Okay. 23 Q. (BY MR. CARROLL:) Do you</p>	<p>1 about are not deemed within that. 2 Q. (BY MR. CARROLL:) And that 3 was what -- 4 A. Not within that area, correct. 5 Q. Right. How many switching 6 yards do you have? 7 A. We actually have two, one at 8 the north end and one at the south end, 9 which would be Talladega, and the south 10 end being Railroad -- Gantts Quarry, which 11 is in Sylacauga or part of Sylacauga. 12 Q. I take it in those two areas 13 you have got regular train activity, cars 14 being moved, locomotives pushing cars, 15 that sort of activity. Is it more or less 16 on a continuous basis or is it five times 17 during the day or is there any way to 18 estimate how much activity is going on in 19 those two areas? 20 A. In the southern area, it would 21 be constant, 24/5 days a week. In the 22 northern area, it would be once a day five 23 days a week for Eastern Alabama Railway</p>
Page 18	Page 20
<p>1 remember any particular question that you 2 provided the answer to? 3 A. Yes. 4 Q. Which ones? 5 A. Number 2. 6 Q. Okay. 7 A. Number 6. I think those are 8 the only two. 9 Q. In your answer Number 2 or 10 rather EARY's answer to Interrogatory 11 Number 2, it indicates that the trains or 12 EARY's train travels down tracks twice a 13 day five days a week. Is that still 14 accurate? 15 A. It is accurate on the -- one 16 area but not in the switching yards. 17 Q. And for us nonrailroad people, 18 what is a switching yard? 19 A. A switching yard would be 20 where the trains sort out the cars to take 21 into the plants to be loaded or unloaded. 22 MR. DEBUYS: It may help you 23 that these two parcels that we are talking</p>	<p>1 and twice a day for CSXT. 2 Q. Okay. I think as your counsel 3 just indicated, the two parcels that the 4 Utilities Board is condemning this action, 5 neither of those parcels are in these two 6 switching areas, correct? 7 A. Correct. 8 Q. So aside from these two 9 switching areas, the rest of the track, is 10 the answer in Interrogatory Number 2 still 11 accurate, that a train travels up the 12 tracks once a day and travels back down 13 the tracks once a day? 14 A. Correct. 15 Q. Your interrogatory response 16 indicates that railroad usage is 17 anticipated to increase by twenty-five 18 percent in the near future based on 19 additional customers. What additional 20 customers? 21 A. IKO. 22 Q. When IKO comes online, is that 23 going to result in additional train trips</p>

5 (Pages 17 to 20)

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1 up and down the tracks from Sylacauga to
2 Talladega or is it going to just result in
3 additional cars being added to the current
4 one train?

5 A. It could add additional days
6 to the week.

7 Q. So instead of just Monday
8 through Friday, it may add Saturday and
9 Sunday?

10 A. And Sunday.

11 Q. But it still is only going to
12 be one train going up in the morning and
13 coming back down in the afternoon?

14 A. That is our initial plan, you
15 know.

16 Q. Right.

17 A. That could change.

18 Q. But at least right now, that
19 is the plan?

20 A. Correct.

21 Q. Just so I understand how all
22 this works, the principal switching
23 yard -- this is just a general EARY

Page 22

1 operations question.

2 A. Correct.

3 Q. The principal switching yard
4 for EARY is around Sylacauga in the Gantts
5 junction, Gantts Quarry area, correct?

6 A. Correct.

7 Q. And the way the railroad works
8 is the railroad loads up cars in the
9 Sylacauga area sometime in the morning or
10 the prior evening and then sends a train
11 from Sylacauga north to Talladega to this
12 other switching yard that you indicated is
13 in the Talladega area, correct?

14 A. Correct.

15 Q. And they unload their cars.
16 The switching yard in the Talladega area,
17 does it adjoin or is it connected to an
18 interstate line?

19 A. It is an interchange point for
20 CSX. In other words, we give the cars to
21 CSX. They in turn give us back empty cars
22 to --

23 Q. And then CSX will take over

Page 23

1 the cars and they will move it to an
2 interstate line. Then it can go anywhere
3 from the country from there?

4 A. Correct.

5 Q. That is how the factories and
6 the manufacturers and the quarries down in
7 the Sylacauga area ship their goods to
8 wherever market they are going to ship
9 them to?

10 A. Correct.

11 Q. Now, when the train makes the
12 trip in the morning, how long does the
13 trip up the tracks from Sylacauga to
14 Talladega usually take?

15 A. The trip takes about two to
16 two and a half hours from Sylacauga to
17 Talladega.

18 Q. Is it the same amount of time
19 coming back or is it quicker because the
20 cars aren't full?

21 A. It's the same time because of
22 the speed limit.

23 Q. Is there a set speed limit the

Page 24

1 whole length of the track or is it
2 different speed limits in different areas?
3 For example, is it slower in downtown
4 Sylacauga versus outside, or is it all --

5 A. It is the same the whole
6 track.

7 Q. What is the speed limit?

8 A. Ten miles an hour.

9 Q. That explains why it takes two
10 and a half hours. I think I can make that
11 trip in thirty.

12 A. Yeah.

13 Q. The morning trip, is there a
14 set time that the train always leaves or
15 is it an approximate time?

16 A. It varies. The crew goes on
17 duty at a set time. But it is according
18 to how much work they have to do prior to
19 leaving.

20 Q. What time does the crew go on
21 duty?

22 A. The crew that goes to
23 Talladega?

8 (Pages 21 to 24)

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<p>1 Q. Yes.</p> <p>2 A. They go on duty at 1800 hours.</p> <p>3 6:00.</p> <p>4 Q. 6:00 p.m.?</p> <p>5 A. (Nodding.)</p> <p>6 Q. You can tell I was never in</p> <p>7 the military. How long is their shift?</p> <p>8 A. By law they can work up to</p> <p>9 twelve hours.</p> <p>10 Q. So they work twelve-hour</p> <p>11 shifts?</p> <p>12 A. Ten to twelve.</p> <p>13 Q. So the crew is going to be on</p> <p>14 duty. That crew, the Sylacauga crew, is</p> <p>15 that what you call it, the Sylacauga crew?</p> <p>16 I take it you have got more than one crew.</p> <p>17 A. Correct. The crew has a name</p> <p>18 and a number. And I will give it to you,</p> <p>19 and then I will explain it. It is the</p> <p>20 GAM – no, excuse me, I am wrong. It is</p> <p>21 the EAMGATA and then the particular date.</p> <p>22 So if you want to put XX in there. So it</p> <p>23 is stands for Eastern Alabama Merchandise/</p>	<p>1 in my head that it left in the morning,</p> <p>2 but that helps me. Okay. Is the reason</p> <p>3 y'all leave at night because there's less</p> <p>4 road traffic or is there another reason?</p> <p>5 A. The reason, the first shift</p> <p>6 works the day job, and they switch cars</p> <p>7 out and prepare for the crew at night.</p> <p>8 During the day, the maintenance crews work</p> <p>9 the tracks.</p> <p>10 Q. I know there's not a set time,</p> <p>11 but on average from the time the rail crew</p> <p>12 reports to work at 6:00, how long does it</p> <p>13 usually take for them to get the train</p> <p>14 started on the trip north to Talladega?</p> <p>15 A. Two to two and a half hours.</p> <p>16 Q. Now, the train that comes back</p> <p>17 down from Talladega, does the same crew</p> <p>18 drive that train back after the cars are</p> <p>19 taken off?</p> <p>20 A. Correct.</p> <p>21 Q. So they will usually leave</p> <p>22 around 8:00 p.m. and it will take two to</p> <p>23 two and a half hours to get to Talladega.</p>
Page 26	Page 28
<p>1 Gantts Junction to Talladega.</p> <p>2 Q. Okay.</p> <p>3 A. And the only thing that</p> <p>4 changes daily would be the date.</p> <p>5 Q. That is the XX designation?</p> <p>6 A. Yeah.</p> <p>7 Q. If they go on duty at 6:00</p> <p>8 p.m. and work ten to twelve hours, are</p> <p>9 they going to be the one that takes the</p> <p>10 train north to Talladega?</p> <p>11 A. They are the one that takes</p> <p>12 the train north to Talladega and then</p> <p>13 back.</p> <p>14 Q. Okay. So they leave sometime</p> <p>15 fairly early in the morning, sometime</p> <p>16 before 6:00 a.m., I take it?</p> <p>17 A. No, 1800 hours, they go to</p> <p>18 work at night that takes the train to</p> <p>19 Talladega.</p> <p>20 Q. The train to Talladega leaves</p> <p>21 at night?</p> <p>22 A. Correct.</p> <p>23 Q. Okay. For some reason I had</p>	<p>1 How long does it normally take for the</p> <p>2 cars to get switched out in the Talladega</p> <p>3 yard?</p> <p>4 A. I would say an hour to an hour</p> <p>5 and a half. There are certain Federal</p> <p>6 inspections.</p> <p>7 Q. And then after that, they will</p> <p>8 make the return trip back to Sylacauga?</p> <p>9 A. Correct.</p> <p>10 Q. They usually arrive back in</p> <p>11 Sylacauga around 3:00 a.m., 2:00 a.m. to</p> <p>12 3:00 a.m.?</p> <p>13 A. 1:00 to 3:00.</p> <p>14 Q. Is there ever any reason that</p> <p>15 that schedule was changed, the train</p> <p>16 travels up to Talladega during the daytime</p> <p>17 as opposed to the night?</p> <p>18 A. Correct. If CSX has not</p> <p>19 delivered, then that crew will leave and</p> <p>20 drive back home and leave the train up</p> <p>21 there until CSX delivers. Then another</p> <p>22 crew would go up and pick it up and then</p> <p>23 come back.</p>

7 (Pages 25 to 28)

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1 Utilities Board provided diagrams for the
2 underground pipelines it planned to
3 install at --
4 A. I don't deal with that portion
5 of it.
6 Q. You didn't review those
7 guidelines?
8 A. No.
9 Q. I'm sorry. Let me rephrase
10 that. You didn't review any diagrams
11 that --
12 A. No.
13 Q. Did you monitor the
14 construction of the water lines when the
15 Utilities Board was inserting them at
16 Oldfield Road or Rocky Mountain Church
17 Road?
18 A. I guess my question is, did
19 Sylacauga utilities do it or did a
20 contractor do it?
21 MR. DEBUYS: The question was
22 did you monitor them.
23 A. Did I monitor them? No, I did

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1 not monitor them.
2 Q. (BY MR. CARROLL:) Are you
3 aware if anybody for the railroad
4 monitored their activities?
5 A. We had a watchman out there to
6 protect their -- them but not to monitor
7 the installation, no.
8 Q. This was a watchman, a
9 flagman --
10 A. Flagman, watchman to make sure
11 that a train or something didn't --
12 Q. If I understand your
13 testimony, there was nobody there to make
14 sure that their construction was done
15 properly?
16 A. I'm not qualified to do that.
17 No, I didn't have anybody.
18 Q. Since they have been inserted,
19 the two pipelines have been inserted, have
20 you been out to the two sites to inspect
21 them?
22 A. Yes.
23 Q. When was that?

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1 A. I've been out there. It was
2 either a day or two after they notified us
3 that they had finished the area.
4 Q. At that time, you traveled out
5 there to take a look at them?
6 A. To take a look at them.
7 Q. Did anybody go with you?
8 A. Nobody went with me, no.
9 Q. When you were inspecting them,
10 what did you do?
11 A. Oh, I looked at the track area
12 to see if it was, you know, safe. So --
13 Q. Did you get on the track?
14 A. No. Do you mean -- do you
15 mean like get -- what I did is look to see
16 if the track was level, if there was any
17 deviation in the track.
18 Q. Did you get out of your truck
19 and walk around?
20 A. Correct.
21 Q. Did you walk around within
22 EARY's right-of-way?
23 A. Correct.

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1 Q. How much time did you spend at
2 the two sites?
3 A. I wouldn't say over ten
4 minutes. Not a lot to see.
5 Q. True. Of what you could see,
6 did you see anything that caused you
7 concern?
8 A. Not that I seen right off the
9 bat. My maintenance of way contractor has
10 looked at the vents and things that are
11 supposed to be there and found one at one
12 site and none at the other.
13 Q. Found one at one site and
14 found none at the other?
15 A. Correct.
16 Q. Who was that?
17 A. David Benefield.
18 Q. And when did he go out there?
19 A. He just noticed that in his
20 track inspections. I don't know exactly
21 what date.
22 Q. So one of the days when he got
23 in the hi-line truck and drove down the

34 (Pages 133 to 136)

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1 track, he noted that there was a missing
2 vent?
3 A. Vent, yeah.
4 Q. Do you know if he got out of
5 the truck to take a closer look?
6 A. Yes. I do know that he got
7 out of the truck. What he thought might
8 have been vents on the other one was
9 actually looked like cut-off valves flush
10 with the ground rather than the boot, one
11 that comes up and makes a turn.
12 Q. But he never saw a second
13 vent?
14 A. No.
15 Q. And I take it when he observed
16 this, you haven't gone out there
17 subsequent to this initial trip --
18 A. No.
19 Q. -- back in I guess May of last
20 year?
21 A. Correct.
22 Q. And you weren't with him on
23 this trip?

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1 A. No.
2 Q. When you went out there to do
3 this inspection of the site, I assume you
4 obtained a track warrant.
5 A. I had a track warrant.
6 Actually, I had permission under Dave's --
7 David Benefield's track warrant.
8 Q. So this is May of 2010, right?
9 A. That is when it was --
10 Q. Shortly --
11 A. It was a day or two after they
12 finished up.
13 Q. Okay. So Mr. Benefield,
14 because he was the contractor who was
15 going to be inspecting the line, he would
16 have had the track warrant?
17 A. Correct.
18 Q. And so you called him --
19 A. Told him that I was going to
20 go out to that. He can give me permission
21 under his track warrant to enter his
22 territory.
23 Q. And if you call Mr. Benefield

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1 because he is the holder of the track
2 warrant --
3 A. Correct.
4 Q. -- and he gives you
5 permission, you can go ahead and do it?
6 A. I can go ahead.
7 Q. Did you have a flagman with
8 you?
9 A. Did I have a flagman with me?
10 No, I didn't enter on into the track. I
11 am an EIC.
12 Q. I'm sorry. You said you
13 didn't enter onto the track?
14 A. I didn't enter onto the track.
15 I went across over the crossing, looked
16 for deviation using that. I could have
17 entered the track with the permission
18 because I could see two hundred and twenty
19 feet in either direction. Actually, you
20 can look for deviation. The farther away
21 you are, the easier it is to see.
22 Q. But in either case, when you
23 went to these two crossings at Oldfield

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1 Road and Rocky Mountain Church Road, you
2 could see two hundred twenty feet in
3 either direction?
4 A. In either direction.
5 Q. Aside from Mr. Benefield's
6 report to you that he didn't see a vent
7 for one of these two lines, is there
8 anything else, sitting here today, that
9 causes you concern about the construction?
10 A. Nothing.
11 Q. Was there any interference
12 with the railroad's operations for any
13 point of time when the Utilities Board
14 installed its pipelines, underground
15 pipelines?
16 A. Not to my knowledge.
17 Q. Take a look at Exhibit 2. I
18 think it is the interrogatory responses.
19 Interrogatory Response Number 7 is what I
20 was specifically going to ask you about,
21 give you a chance to look at it.
22 (Pause.)
23 A. Okay.

35 (Pages 137 to 140)

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1 Q. (BY MR. CARROLL:) Looks like
2 Interrogatory Response 7 indicates that
3 granting access to any part of the surface
4 without notification and lookout insurance
5 is unsafe and unduly increases the risk of
6 loss to EARY.

7 Do you agree with that
8 statement that access to any part of the
9 surface of EARY's right-of-way, whether it
10 is fouling the track or not, unduly
11 increases the risk to EARY?

12 A. Anytime anybody enters the
13 property, it could be a risk.

14 Q. Okay. If somebody enters the
15 property but they are not fouling the
16 track, what is the risk?

17 A. A snakebite, anything.

18 Q. Okay. Any specific thing
19 aside from snakebite that you can think of
20 right now?

21 A. Uneven terrain and not fouling
22 the track. You know, I could give you a
23 ton of hypotheticals.

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1 Q. Okay. Aside from snakebite
2 and uneven terrain, what other ones pop to
3 mind?

4 A. You know, with the uneven
5 terrain, falling and getting hurt,
6 anything that anybody getting on the
7 property getting, you know --

8 Q. So basically anytime somebody
9 gets on somebody else's property,
10 something could happen.

11 A. Could happen.

12 Q. And that the property owner
13 could get sued as a result.

14 A. Correct.

15 Q. And that is sort of the basis
16 for your view that --

17 A. If --

18 Q. -- giving the Utilities Board
19 access to any part of the surface is
20 unsafe and unduly increases the risk of
21 loss to EARY; is that correct?

22 A. Correct.

23 Q. So, for example, we are in

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1 Burr & Forman's offices. Me being here at
2 Burr & Forman, I could trip and fall, sue
3 poor John over there. And that would
4 unduly be as a result, my presence here is
5 unsafe and unduly increases the risk of
6 loss to Burr & Forman. Is that --

7 MR. DEBUYS: Object to the
8 form.

9 Q. (BY MR. CARROLL:) You can
10 answer.

11 MR. DEBUYS: You can go ahead
12 and answer.

13 A. I would say yeah, it could be.

14 Q. (BY MR. CARROLL:) Can you
15 tell me, just within the last ten years,
16 how many incidents there have been for
17 EARY where somebody from the Utilities
18 Board has gotten on the property and
19 there's been some sort of accident or
20 problem that they blamed the railroad for?

21 A. No, I can't.

22 Q. Can you think of any?

23 A. No. Can we take a quick

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1 break?

2 (Whereupon, a break was had
3 from 4:56 p.m. until 4:59 p.m.)

4 Q. (BY MR. CARROLL:) I know you
5 said you haven't had any experience in
6 line marking. Do you know if it is
7 possible for the Utilities Board to
8 perform line marking without fouling
9 EARY's track on these two parcels?

10 A. Without fouling the track? It
11 is possible without fouling the track?

12 Q. Right. Do you know if that is
13 possible?

14 A. They could do it without
15 fouling the track, but they would still be
16 on EARY property. I guess, you know, not
17 knowing how close or how far apart their
18 markings have to be on either side of the
19 track.

20 MR. DEBUYS: If you have got
21 to mark the entire line, the line going to
22 the track?

23 A. I mean, you could probably

36 (Pages 141 to 144)

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1 mark it a hundred and fifty feet off over
2 here and a hundred and fifty feet off over
3 here hypothetically and hope that the two
4 would connect, which would be off of our
5 property and off of our track.

6 MR. DEBUYS: I will ask the
7 question, is what I am supposed to do. Go
8 ahead.

9 A. Okay.

10 Q. (BY MR. CARROLL:) Going back
11 to this statement about unduly increasing
12 the risk if you've got anybody from the
13 Utilities Board on EARY's right-of-way and
14 specifically the use of that word
15 "unduly," can you quantify the increase in
16 risk or have any way to estimate it?

17 A. I can't.

18 Q. Assuming a Utilities Board
19 person had to be in close proximity to
20 EARY's tracks when they were doing the
21 line marking, do you know how long they
22 would have to be close to those tracks
23 when they were performing that?

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1 A. I have no idea. I haven't
2 observed them doing it.

3 Q. I assume that EARY would
4 object to, based on these interrogatory
5 answers, would object to the Utilities
6 Board doing other types of maintenance on
7 the right-of-way aside from line marking.

8 A. Correct.

9 Q. Why would other types of
10 maintenance interfere with railroad
11 operations?

12 A. Why would they interfere with
13 railroad operations? Well, first of all,
14 I would have to get somebody to escort
15 them and take me away from my normal work.

16 Q. Okay.

17 A. I can't tell stories. I'm
18 sorry.

19 Q. Anything else you can think of
20 as you sit here right now?

21 A. No, not right now.

22 Q. One of the issues in this
23 litigation is valuation of the two parcels

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1 that the Utilities Board seeks to condemn.
2 I know EARY has obtained their own expert
3 to talk about that.

4 Do you personally have any
5 opinions regarding valuation that you
6 intend to offer at the hearing in this
7 matter?

8 A. No.

9 Q. Another issue is EARY's demand
10 as a condition of condemnation that the
11 Utilities Board provide insurance for
12 EARY. Do you have any views regarding the
13 need for the Utilities Board to obtain
14 insurance with EARY named as a
15 beneficiary?

16 A. Do I personally have any
17 views?

18 Q. Yes.

19 A. Other than we have an amount
20 that we have to pay up until our insurance
21 kicks in to protect the profitability of
22 my railroad. If something happens, if
23 somebody was injured, then, you know, that

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1 would be my view. If somebody come onto
2 the property and they were injured and I
3 had to pay for them to -- you know, if
4 they sued us or whatever to --

5 Q. Okay.

6 A. For it.

7 Q. I think I understand.

8 A. Our insurance has a
9 deductible, you know.

10 Q. I think I understand this.

11 Tell me if I am getting this wrong. But
12 the way your insurance policy works is you
13 have got some deductible -- it may be
14 fairly high -- that EARY has to pay. If
15 there's an incident and somebody sues them
16 and they get a judgment or they enter a
17 settlement, there's a certain portion of
18 that that EARY has got to pay before the
19 insurance is triggered and the insurance
20 covers the rest of the amount.

21 A. Right.

22 Q. And if EARY had to make that
23 payment, that would come out of EARY's

37 (Pages 145 to 148)

EXHIBIT 4

ORDINANCE NO. 2097

**AN ORDINANCE GRANTING A WATER
FRANCHISE TO THE UTILITIES
BOARD OF THE CITY OF SYLACAUGA, ITS
SUCCESSORS AND ASSIGNS**

BE IT ORDAINED by the City Council of the City of Sylacauga, Alabama, as follows:

(1) The words "the City" as used herein mean the City of Sylacauga, a municipal corporation in the State of Alabama, as it is now constituted and as it may be hereafter extended and enlarged. The words "the Board" as used herein mean The Utilities Board of the City of Sylacauga, a public corporation organized and existing under the provisions of Article 9 of Chapter 50 of Title 11 of the Code of Alabama of 1975, as amended.

(2) There is hereby granted to the Board the right, privilege, authority, and franchise to acquire, own, maintain, construct, enlarge, and operate a water works plant and water distribution system in the City, together with the right, privilege, authority and franchise to lay, construct, operate and maintain pipes, mains, and other conduits, fixtures, and related appurtenances in, along, across, and under the streets, avenues, alleys and other public places within the City for the purpose of conveying and distributing water in and through the City, and to repair, renew, re-lay and extend such pipes, mains, conduits, fixtures, and related appurtenances and to make all excavations necessary therefor.

(3) The Board shall, and by accepting this franchise agrees that it will, upon making any excavations of the streets, avenues, alleys, public ways and public places in the City, restore the paving or other surface at the point of such excavations in substantially the same condition as before such work was done, all as promptly as may be practicable and within a reasonable length of time thereafter.

(4) The rights, privileges, franchise and authority hereby granted may be exercised by the Board or any successors and assigns of the Board, and may be mortgaged or conveyed in trust as security for any bonds or other obligations of the Board, or of its successors and assigns, all subject nevertheless to the conditions and obligations herein contained.

(5) This ordinance shall become effective upon the publication thereof hereinafter provided for; and the rights, privileges, consent and franchise herein granted shall begin at the effective date hereof and shall continue in effect for a period of thirty (30) years from the effective date. Upon becoming effective, this ordinance shall supersede prior ordinances granting a water franchise to the Board.

(6) This ordinance shall be published at the expense of the Board one time in the Daily Home, a newspaper published and having general circulation in the City.

(7) The Board shall, within ninety (90) days after the adoption and approval of this ordinance, file a written acceptance of the franchise herein granted with the city clerk.

(8) The provisions of this ordinance are intended to be severable and, if any one or more thereof should be held invalid for any reason, the remaining provisions shall nevertheless stand and remain fully effective.

ADOPTED this 6 day of August, 2008.

CITY OF SYLACAUGA
A Municipal Corporation


Doug Murphree, City Council President

APPROVED this 6 day of August, 2008.


Sam H. Wright, Mayor

ATTEST:


Patricia G. Carden, City Clerk/Treasurer

CERTIFICATE OF PUBLICATION

I, Patricia Carden, as City Clerk of the City of Sylacauga, Alabama, hereby certify that the foregoing ordinance was published in the Daily Home, a newspaper published and having general circulation in the said City, in the issue of the said newspaper dated and placed in circulation on September 5, 2008.

WITNESS my signature this 23 day of October, 2008.


City Clerk

ORDINANCE NO. 2096

**AN ORDINANCE GRANTING A SANITARY
SEWER FRANCHISE TO THE UTILITIES
BOARD OF THE CITY OF SYLACAUGA, ITS
SUCCESSORS AND ASSIGNS**

BE IT ORDAINED by the City Council of the City of Sylacauga, Alabama, as follows:

(1) The words "the City" as used herein mean the City of Sylacauga, a municipal corporation in the State of Alabama, as it is now constituted and as it may be hereafter extended and enlarged. The words "the Board" as used herein mean The Utilities Board of the City of Sylacauga, a public corporation organized and existing under the provisions of Article 9 of Chapter 50 of Title 11 of the Code of Alabama of 1975, as amended.

(2) There is hereby granted to the Board the right, privilege, authority, and franchise to acquire, own, maintain, construct, enlarge, and operate a sanitary sewer system in the City, together with the right, privilege, authority and franchise to lay, construct, operate and maintain pipes, mains, and other conduits, fixtures, and related appurtenances in, along, across, and under the streets, avenues, alleys and other public places within the City for the purpose of collecting, transporting and disposing of sewage and other wastes, and to repair, renew, re-lay and extend such pipes, mains, conduits, fixtures, and related appurtenances and to make all excavations necessary therefor.

(3) The Board shall, and by accepting this franchise agrees that it will, upon making any excavations of the streets, avenues, alleys, public ways and public places in the City, restore the paving or other surface at the point of such excavations in substantially the same condition as before such work was done, all as promptly as may be practicable and within a reasonable length of time thereafter.

(4) The rights, privileges, franchise and authority hereby granted may be exercised by the Board or any successors and assigns of the Board, and may be mortgaged or conveyed in trust as security for any bonds or other obligations of the Board, or of its successors and assigns, all subject nevertheless to the conditions and obligations herein contained.

(5) This ordinance shall become effective upon the publication thereof hereinafter provided for; and the rights, privileges, consent and franchise herein granted shall begin at the effective date hereof and shall continue in effect for a period of thirty (30) years from the effective date. Upon becoming effective, this ordinance shall supersede prior ordinances granting a sanitary sewer franchise to the Board.

(6) This ordinance shall be published at the expense of the Board one time in the Daily Home, a newspaper published and having general circulation in the City.

() (7) The Board shall, within ninety (90) days after the adoption and approval of this ordinance, file a written acceptance of the franchise herein granted with the city clerk.

(8) The provisions of this ordinance are intended to be severable and, if any one or more thereof should be held invalid for any reason, the remaining provisions shall nevertheless stand and remain fully effective.

ADOPTED this 19th day of August, 2008.

CITY OF SYLACAUGA
A Municipal Corporation


Doug Murphree, City Council President

APPROVED this 19th day of August, 2008.


Sari H. Wright, Mayor

() ATTEST:


Patricia G. Carden, City Clerk/Treasurer

CERTIFICATE OF PUBLICATION

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WITNESS my signature this 23 day of October, 2008.


City Clerk

ORDINANCE NO. 2095

**AN ORDINANCE GRANTING A NATURAL GAS
FRANCHISE TO THE UTILITIES
BOARD OF THE CITY OF SYLACAUGA, ITS
SUCCESSORS AND ASSIGNS**

BE IT ORDAINED by the City Council of the City of Sylacauga, Alabama, as follows:

(1) The words "the City" as used herein mean the City of Sylacauga, a municipal corporation in the State of Alabama, as it is now constituted and as it may be hereafter extended and enlarged. The words "the Board" as used herein mean The Utilities Board of the City of Sylacauga, a public corporation organized and existing under the provisions of Article 9 of Chapter 50 of Title 11 of the Code of Alabama of 1975, as amended.

(2) There is hereby granted to the Board the right, privilege, authority, and franchise to acquire, own, maintain, construct, enlarge, and operate a natural gas distribution system in the City, together with the right, privilege, authority and franchise to lay, construct, operate and maintain pipes, mains, and other conduits, fixtures, and related appurtenances in, along, across, and under the streets, avenues, alleys and other public places within the City for the purpose of transporting and distributing natural gas, and to repair, renew, re-lay and extend such pipes, mains, conduits, fixtures, and related appurtenances and to make all excavations necessary therefor.

(3) The Board shall, and by accepting this franchise agrees that it will, upon making any excavations of the streets, avenues, alleys, public ways and public places in the City, restore the paving or other surface at the point of such excavations in substantially the same condition as before such work was done, all as promptly as may be practicable and within a reasonable length of time thereafter.

(4) The rights, privileges, franchise and authority hereby granted may be exercised by the Board or any successors and assigns of the Board, and may be mortgaged or conveyed in trust as security for any bonds or other obligations of the Board, or of its successors and assigns, all subject nevertheless to the conditions and obligations herein contained.

(5) This ordinance shall become effective upon the publication thereof hereinafter provided for; and the rights, privileges, consent and franchise herein granted shall begin at the effective date hereof and shall continue in effect for a period of thirty (30) years from the effective date. Upon becoming effective, this ordinance shall supersede prior ordinances granting a natural gas franchise to the Board.

(6) This ordinance shall be published at the expense of the Board one time in the Daily Home, a newspaper published and having general circulation in the City.

(7) The Board shall, within ninety (90) days after the adoption and approval of this ordinance, file a written acceptance of the franchise herein granted with the city clerk.

(8) The provisions of this ordinance are intended to be severable and, if any one or more thereof should be held invalid for any reason, the remaining provisions shall nevertheless stand and remain fully effective.

ADOPTED this 19th day of August, 2008.

CITY OF SYLACAUGA
A Municipal Corporation


Doug Murphree, City Council President

APPROVED this 19th day of August, 2008.


Sam H. Wright, Mayor

ATTEST:


Patricia G. Carden, City Clerk/Treasurer

CERTIFICATE OF PUBLICATION

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WITNESS my signature this 23 day of October, 2008.


City Clerk

ORDINANCE NO. 2094

**AN ORDINANCE GRANTING AN ELECTRIC
FRANCHISE TO THE UTILITIES
BOARD OF THE CITY OF SYLACAUGA, ITS
SUCCESSORS AND ASSIGNS**

BE IT ORDAINED by the City Council of the City of Sylacauga, Alabama, as follows:

(1) The words "the City" as used herein mean the City of Sylacauga, a municipal corporation in the State of Alabama, as it is now constituted and as it may be hereafter extended and enlarged. The words "the Board" as used herein mean The Utilities Board of the City of Sylacauga, a public corporation organized and existing under the provisions of Article 9 of Chapter 50 of Title 11 of the Code of Alabama of 1975, as amended.

(2) There is hereby granted to the Board the right, privilege, power and franchise to acquire, construct, own, maintain, and operate in the City a system for the distribution of electricity for heat, light and power to the City and to its inhabitants and any person, firm or corporation within or outside of the City for public and private uses, and the consent of the City is hereby granted to the Board to use the streets, avenues, alleys and other public ways and public places in the City for the aforesaid purposes. There is hereby further granted to the Board the right, privilege and power at any time and from time to time, without any requirement as to permit or fee therefor, to repair, renew, extend, enlarge, add to and improve the said system and to construct in, over, along and under any street, avenue, alley or other public way or public place in the City all poles, tower, guy wires, cross arms, wires and cables and other parts used or useful as a part of or in connection with the system, and to make all necessary excavations therefor.

(3) The Board shall, and by accepting this franchise agrees that it will, upon making any excavations of the streets, avenues, alleys, public ways and public places in the City, restore the paving or other surface at the point of such excavations in substantially the same condition as before such work was done, all as promptly as may be practicable and within a reasonable length of time thereafter.

(4) The rights, privileges, franchise and authority hereby granted may be exercised by the Board or any successors and assigns of the Board, and may be mortgaged or conveyed in trust as security for any bonds or other obligations of the Board, or of its successors and assigns, all subject nevertheless to the conditions and obligations herein contained.

(5) This ordinance shall become effective upon the publication thereof hereinafter provided for; and the rights, privileges, consent and franchise herein granted shall begin at the effective date hereof and shall continue in effect for a period of thirty (30) years from the effective date. Upon becoming effective, this ordinance shall supersede prior ordinances granting an electric franchise to the Board.

(6) This ordinance shall be published at the expense of the Board one time in the Daily Home, a newspaper published and having general circulation in the City.

(7) The Board shall, within ninety (90) days after the adoption and approval of this ordinance, file a written acceptance of the franchise herein granted with the city clerk.

(8) The provisions of this ordinance are intended to be severable and, if any one or more thereof should be held invalid for any reason, the remaining provisions shall nevertheless stand and remain fully effective.

ADOPTED this 19th day of August, 2008.

CITY OF SYLACAUGA
A Municipal Corporation


Doug Murphree, City Council President

APPROVED this 19th day of August, 2008.


Sam H. Wright, Mayor

ATTEST:


Patricia G. Carden, City Clerk/Treasurer

CERTIFICATE OF PUBLICATION

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WITNESS my signature this 23 day of October, 2008.


City Clerk